Supreme Court, U.S.
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No.

In the Supreme Court of the United States

BRUCE OSBORNE,

Petitioner,

v.

HARTFORD LIFE AND ACCIDENT INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the Sixth Circuit Court of Appeals erred on an important issue of federal law in holding that, in a claim for disability benefits under a health plan governed by the Employee Retirement Income Security Act ("ERISA") of 1975, as amended, 29 U.S.C. §§ 1001 *et seq.*, a fiduciary may define the material and substantial duties of a claimant's "own occupation" with the Department of Labor's Dictionary of Occupational Titles by choosing an occupation that (1) does not encompass the claimant's actual job duties (conflicting with the holding of the United States Court of Appeals for the Third Circuit) and that (2) is not a position of the same general character as the claimant's previous job, requiring similar skills and training, and involving comparable duties (conflicting with the holdings of the United States Court of Appeals for the First, Second, and Fourth Circuits)?

STATEMENT OF INTERESTED PARTIES

All parties to this case are named in the caption. This petition is not filed on behalf of a non-governmental corporation requiring a statement as to publicly held ownership interests pursuant to Rule 29.6 of the Rules of this Court.

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PETITION FOR WRIT OF CERTIORARI

Bruce Osborne ("Mr. Osborne") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS AND ORDERS BELOW

The Sixth Circuit opinion is reported as *Bruce Osborne v. Hartford Life and Accident Ins. Co.*, 465 F.3d 296 (6th Cir. 2006). (App. B). The Sixth Circuit denied the petition for rehearing and rehearing *en banc* on January 5, 2007. (App. A). The District Court's opinion entered February 28, 2005, is unreported. (App. C).

JURISDICTION

This action arises under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), specifically 29 U.S.C. § 1132(a)(1)(B). Petitioner, Mr. Osborne, is a participant under the Hartford Life and Accident Insurance Policy No. GLT033342 (the "Policy") issued by the Hartford Life and Accident Insurance Company ("Hartford"). The Policy was and is an "employee welfare benefit plan" and "welfare benefit plan" as defined by 29 U.S.C. § 1002(1) and all subparagraphs thereof.

On January 23, 2002, Mr. Osborne filed his lawsuit in the Chancery Court of Tennessee for the Thirtieth Judicial District of Memphis. On March 1, 2002, the Hartford removed this action to the United States District Court for the Western District of Tennessee, Western Division. Judgment was entered against Mr. Osborne on March 3, 2005, disposing of his action. The opinion of the United States Court of Appeals for the Sixth Circuit affirming the district

court was entered on October 5, 2006. (App. B). An order denying Mr. Osborne's timely petition for rehearing and for rehearing *en banc* was entered on January 5, 2007. (App. A). This Court's jurisdiction is invoked under 29 U.S.C. § 1132(e)(1).

PERTINENT STATUTORY PROVISIONS

In relevant part, 29 U.S.C. § 1132 states as follows:

(a) Persons empowered to bring a civil action

A civil action may be brought-
(1) by a participant or beneficiary-

****

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan[.]

STATEMENT OF THE CASE

Mr. Osborne was a president of Insurex Benefits Administrators, Inc. and Insurex Agency, Inc. ("Insurex"), a subsidiary of TPI Restaurants, Inc., the policyholder with Hartford. Insurex is an insurance agency and third-party administrator that sells various insurance coverage and/or third-party administrative services to employers. Mr. Osborne's duties as president required him to travel extensively and promote himself and Insurex directly to potential and existing clients as well as insureds that he represented.

Mr. Osborne, as well as other executives of Insurex, negotiated for and received a specific endorsement from Hartford to the Policy that contains the following definition of Total Disability:

> With respect to ALL Full-time Non-Administrative Employees that achieved the rank Executive Manager and above . . . the Definition of Total Disability . . . shall read as follows:
>
> * * * * *
>
> Totally disabled means you are prevented by disability from doing all the material and substantial duties of **your own occupation** on a fulltime basis.

(emphasis added). The Hartford did not define the term "your own occupation" or "occupation" in the Policy nor did the Hartford make any reference to the manner in which these terms would be defined.[1]

As to all other employees, the Policy provides the following definition of Total Disability:

> Totally Disabled means that:
>
> * * * * *
>
> b. [Y]ou are prevented by Disability from doing all the material substantial duties of your own occupation on a full-basis. After that, and for as long as you remain Totally Disabled, you are prevented by

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[1] This policy language is substantially similar to policy language of other insurance companies that have offered this coverage as is evident in the case law.

> disability from doing any occupation or work for which you are or could become qualified.

(emphasis added). Thus, for executive employees like Mr. Osborne, the Policy provides that Mr. Osborne is considered disabled if he is prevented by his disability from performing "all the material and substantial duties" of his "own occupation." For all other employees, once the Hartford determines an employee cannot perform the material and substantial duties of their "own occupation," the employee is only considered disabled if the Hartford also determines that the employee cannot perform "any occupation" that the employee is qualified to perform or could become qualified to perform.

In 1996, Mr. Osborne was diagnosed with congestive heart failure, which is a debilitating and incurable condition. Shortly thereafter, the Hartford determined that Mr. Osborne was Totally Disabled as defined above and could not perform the "material and substantial duties" of his "own occupation" as a president of Insurex. The Hartford then began paying Mr. Osborne disability benefits under the Policy.

In 1997, the Hartford required Mr. Osborne to apply for Social Security benefits as required under the Policy. On July 1, 1998, the Social Security Administration determined that Mr. Osborne was disabled due to his congestive heart failure and was entitled to benefits under the Social Security Act retroactive from May 28, 1996. Subsequently, the Hartford reduced the benefits it paid under the Policy by the amount the Social Security Administration paid Mr. Osborne. The Hartford also required Mr. Osborne to pay to the Hartford $37,012.79 to offset the accrued benefits he received from the Social Security Administration.

In July 2000, Hartford began its annual review of Mr. Osborne's condition to determine whether he continued to qualify for disability benefits under the Policy. In March of 2001, the Hartford denied Mr. Osborne further disability benefits due to its determination that Mr. Osborne was no longer Totally Disabled under the Policy. In making this determination, unlike in its initial determination of benefits, the Hartford utilized the Department of Labor's Dictionary of Occupational Titles (the "DOT") to interpret and define Mr. Osborne's "own occupation" under the Policy as the "President of a Financial Institution," which the DOT classifies as a sedentary occupation.

As stated above, Mr. Osborne was not the President of a Financial Institution, but rather, he was a president of Insurex, an insurance agency and third-party administrator that sells various insurance coverage and/or third-party administrative services to employers. Mr. Osborne's occupation was not sedentary. Mr. Osborne's duties as a president required him to travel extensively and promote himself and Insurex directly to potential and existing clients as well as insureds that he represented. The Hartford did not consider these duties, among others, but only considered whether Mr. Osborne could perform sedentary work. Thus, the Hartford did not consider Mr. Osborne's actual job duties at Insurex (as required in the Third Circuit).

Additionally, by its use of the DOT to classify Mr. Osborne's occupation as President of a Financial Institution, the Hartford did not use a comparable job description in the DOT (as required in the First, Second, and Fourth Circuits). Specifically, the Hartford should have used the DOT description of "Sales Agent, Insurance," which requires light duty physical activity and comparable job duties.

Although the Hartford was supplied with ample evidence of Mr. Osborne's duties as a president of Insurex, the Hartford interpreted Mr. Osborne's "own occupation" via the DOT as a "President, Financial Institution." According to the Department of Labor, the physical requirements of a "President, Financial Institution" are "sedentary." The Hartford succinctly stated:

> Our vocational assessment of Mr. Osborne's occupation as a "President of a Financial Institution," has classified this occupation as "sedentary." This was based on how the occupation is performed in the national economy as classified by the Department of Labor, and is not an individual's job specific assessment. Although Mr. Osborne's specific job in the occupation of a "President of a Financial Institution" may have involved traveling, the occupational requirements per the DOT Code, does not require traveling.

The Hartford further stated:

> Our review of Mr. Osborne's medical information received to date has determined he has the ability to perform a fulltime sedentary occupation. Although Mr. Osborne does have some restrictions and limitations due to his diagnosis and medical condition, the medical records reflect his condition is not severe enough to preclude fulltime sedentary work.

(emphasis added). The complaint from Mr. Osborne's perspective is clearly that he is not a President of a Financial Institution and that his actual occupation as a president of Insurex is not sedentary.

> The DOT provides that the President of a Financial Institution:
>
> Plans develops, and directs financial policies and practices of bank, savings bank, commercial bank, trust company, mortgage company, credit union, or company dealing in consumer credit, such as a finance company, to ensure that financial objectives, goals, and institutional growth are met and in accordance with policies of Board of Directors or corporate charter and government regulations.[2]

This description provides that the President of a Financial Institution is one who plans and develops policies of a bank or similar institution. The description of Mr. Osborne's occupation as a president of Insurex clearly does not compare to the President of a Financial Institution as defined in the DOT. Mr. Osborne's occupational duties as a president of Insurex were to market and sell products, not develop policies. Specifically, his duties were:

- Job Title: President - IBA (Insurex Benefits Administration); Director-Employee Benefit Division Insurex Agency Inc.

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[2] The Hartford claimed that it used the DOT definition of "President, Any Industry" in denying Mr. Osborne's claim. However, this classification was only mentioned in one letter by the Hartford. The use of this description further exemplifies the global problem with utilizing the DOT to define a claimant's occupation, because the DOT pigeonholes "President, Any Industry" as sedentary. As a clear example of why this classification is arbitrary, Mr. Osborne was a president of Insurex, yet his occupation was not sedentary.

- Duties: Marketing to Self Funded Employer's; Selling Group Products to employers. All duties require extensive travel and long days usually 7:00 A.M. — 10:00 P.M.

- Physical requirements are standing 34% to 66% of the time, walking 34% to 66% of the time, and sitting 34% to 66% of the time.

- Responsible for the sales and marketing of new clients that entails extensive traveling. Negotiating with insurance companies on quotes for proposals and renewal rates. Providing customer service and assistance to the existing clients. Meeting with brokers to discuss perspective clients and existing clients. Oversee the internal functions of the company, staff and production issues. Consultant and member of QUBIC - Employee Benefits Management Consortium. (emphasis added).

It is clear that Mr. Osborne's actual duties were not considered by the Hartford in its determination of benefits. The Sixth Circuit's affirmation of the Hartford's denial is contrary to the holding of the Third Circuit Court of Appeals, which, as discussed below, requires that an ERISA fiduciary consider a claimant's actual job duties in determining benefits.

Additionally, the Hartford had available in the DOT a comparable description of Osborne's occupation and its failure to use that comparable description of Mr. Osborne's occupation is reversible error in the First, Second and Fourth Circuits. The DOT definition of "Sales Agent, Insurance" which consists of light work is defined as follows:

> Sells insurance to new and current clients: Compiles lists of prospective clients to provide leads for additional business. Contacts prospective clients and explains features and merits of policies offered, recommending amount and type of coverage based on analysis of prospect's circumstances, and utilizing persuasive sales techniques. Calculates and quotes premium rates for recommended policies, using calculator and rate books. Calls on policyholders to deliver and explain policy, to suggest additions or changes in insurance program, or to make changes in beneficiaries. May collect premiums from policyholders and keep record of payments. Must hold license issued by state. May be designated according to type of insurance sold as Sales Agent, Casualty Insurance (insurance); Sales Agent, Fire Insurance (insurance); Sales Agent, Life Insurance (insurance); Sales Agent, Marine Insurance (insurance). May work independently selling variety of insurance, such as life, fire, casualty, and marine, for many companies and be designated Insurance Broker (insurance). May work independently selling for one company and be designated General Agent (insurance).
> GOE: 08.01.02 STRENGTH: L GED: R4 M3 L4
> SVP: 6 DLU: 81

(emphasis added). This description is clearly comparable to Mr. Osborne's occupation which requires marketing and selling insurance. If the Hartford desired to use the DOT, it should have used an analogous description of Mr. Osborne's occupation as required in the First, Second, and Fourth Circuits.

Hartford's decision to choose "President of a Financial Institution" to describe Mr. Osborne's occupation ignores Mr.

Osborne's actual job duties and disregards any comparable DOT description, including "Sales Agent, Insurance." This decision is directly relevant to the heart of this petition and conflicts with other Court of Appeals decisions. The Third Circuit defines "occupation" as the duties of the claimant's specific job, without regard to how the occupation is generally performed in the economy at large. *See Lasser v. Reliance Standard Ins. Co.*, 344 F.3d 381, 386 (3rd Cir. 2003) (finding that the term "regular occupation" unambiguously meant the "usual work that the insured [was] actually performing immediately before the onset of disability" and not a general occupation, and that it was arbitrary to conclude otherwise). The First, Second, and Fourth Circuits define "occupation" under ERISA plans to include a position of the same general character as the insured's previous job, requiring similar skills and training, and involving comparable duties. *See Tsoulas v. Liberty Life Assurance Company of Boston*, 454 F.3d 69, 78 (1st Cir. 2006); *Kinstler v. First Reliance Standard Life Ins. Co.*, 181 F.3d 243, 253 (2nd Cir. 1999); *Gallagher v. v. Reliance Standard Life Ins. Co.*, 305 F.3d 264, 272 (4th Cir. 2002). The Sixth Circuit's decision is in conflict with all applicable law from other United States Courts of Appeals and seriously undermines the review for abuse of discretion given to the Sixth Circuit by this Court. This Court has demanded that ERISA claimants should be protected from abuse of discretion by ERISA fiduciaries. *See generally, Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). Therefore, this issue should be heard by this Court to mandate uniformity on this issue of federal law.

A. The District Court's Decision

This matter came before the District Court on a motion for judgment on the record filed by the Hartford. The

District Court reviewed the denial of benefits for an abuse of discretion under the standard set forth in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). In the District Court, Mr. Osborne claimed that the Hartford unreasonably determined that Mr. Osborne was not disabled by use of the DOT to describe his "own occupation" as the President of a Financial Institution because 1) the Policy specifically provides that the Hartford was to consider Mr. Osborne's "own occupation," 2) Mr. Osborne's employer provided the Hartford with Mr. Osborne's job description and the physical requirements of his job, and 3) Mr. Osborne is not the president of a financial institution.[3] The District Court found that Hartford's interpretation of "own occupation" was reasonable.

The District Court held:

> Although Plaintiff's other cases seem to support his interpretation of "own occupation," the Court is persuaded that the more prudent approach is not to usurp the discretion given to the plan administrator to interpret the policy. The term "occupation" is a general term which could be rationally interpreted by using the general definition contained in the D.O.T. *See Ehrensaft*, 120 F.Supp.2d at 1259 (stating that "occupation[ ] is a general description"). Hartford could have used the terms "own actual job" which would have given Defendant less latitude to interpret the terms in a reasonable manner. *See e.g., Vantreese*, No. 97-1241, at 8-10 (stating that "[p]laintiff's *occupation* was that of registered nurse [while] her *specific job* was that of an orthopaedic registered

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[3] The Sixth Circuit had not definitively ruled upon this issue.

> nurse") (emphasis in original). Further, this conclusion is consistent with the Sixth Circuit's decision in *Schmidlkofer* which held that using the D.O.T. definition to interpret the terms "his regular occupation" was rational. *See Schmidlkofer,* No. 03-5755, 2004 WL 1921184, at *2. Although the terms "his regular occupation" could be distinguished from "his own occupation," the terms used in Hartford's policy are still subject to interpretation and the Defendant has the discretionary authority to interpret the policy. *See Hanser,* 821 F.Supp. at 478 (stating that the plaintiff's interpretation "is still simply one interpretation" and concluded that the plan administrator's contrary interpretation was not arbitrary or capricious).

(App. C at 37a–38a). The District Court did not discuss the fact that Mr. Osborne is not the President of a Financial Institution although it was argued in Mr. Osborne's brief numerous times. Thus, the District Court's ruling was contrary to the Third Circuit, which requires that an ERISA fiduciary must consider a claimant's actual job duties, and contrary to the First, Second, and Fourth Circuits, which require that an ERISA fiduciary must use a comparable job description.

B. The Sixth Circuit's Opinion

Mr. Osborne presented the Sixth Circuit with the following issue on appeal:

> Was the Hartford's denial of disability benefits arbitrary and capricious, specifically, was the Hartford's utilization of the Department of Labor's Dictionary of Occupational Titles to define "own

> occupation" under the Policy unreasonable in light of the substantial evidence of Mr. Osborne's actual duties at Insurex?

The Sixth Circuit held:

> We agree with the district court that Hartford's use of the Dictionary to determine Osborne's "own occupation" was not arbitrary and capricious, but on the contrary was "reasonable." The word "occupation" is sufficiently general and flexible to justify determining a particular employee's "occupation" in light of the position descriptions in the Dictionary rather than examining in detail the specific duties the employee performed. "Occupation" is a more general term that seemingly refers to categories of work than narrower employment terms like "position," "job," or "work," which are more related to a particular employee's individual duties. Although reasonable persons may disagree over the most appropriate methodology for determining a particular employee's "occupation," we cannot say that Hartford transgressed the boundaries of its broad discretion under its insurance policy and the ERISA plan to make disability determinations. *Cf. Gallagher v. Reliance Std. Life Ins. Co.*, 305 F.3d 264, 272 (4th Cir.2002) (stating that use of a Dictionary job description is an acceptable reference when the description "involve[s] comparable duties").

(App. B at 9a). Here, the Sixth Circuit held that the Hartford reasonably "used"[4] the DOT in determining Mr. Osborne's "occupation" as the President of a Financial Institution. The Sixth Circuit held that a plan administrator may use the DOT to define an ERISA claimant's "occupation" without any consideration of the claimant's actual occupational requirements. This holding directly conflicts with the holding of the Third Circuit.

The Sixth Circuit cited *Gallagher v. Reliance*, 305 F.3d 264 (4th Cir. 2002) as authority that states a different proposition sufficiently analogous to lend support in the present case. However, *Gallagher*, does not lend support to the Sixth Circuit's ruling but rather is in direct conflict with this ruling. *Gallagher* held that when the term "regular occupation" is not defined in the policy, the plan

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[4] For some reason, the Sixth Circuit stated that the issue in Mr. Osborne's case was the "methodology" Hartford used in determining Osborne's occupation and not the Hartford's "interpretation" of the term "own occupation." (App. B at 10a). While this distinction is unclear to Mr. Osborne, the issue for the Sixth Circuit was whether Hartford's classification of Mr. Osborne's "own occupation" and the ensuing denial was arbitrary and capricious. *See Statement of Issues for Review, Appellant Brief at 2* (stating "Was the Hartford's Denial of Disability Benefits for Mr. Osborne Arbitrary and Capricious . . ."). In support of Osborne's argument that the Hartford's denial was arbitrary and capricious, Osborne argued in his opening brief that 1) he is not the president of a financial institution, but an insurance salesman; 2) his actual job duties should have been considered by Hartford in determining whether he was "Totally Disabled;" 3) Osborne's occupation is not "sedentary;" and 4) it was unreasonable to determine that Osborne could perform sedentary work based on the evidence. *See Appellant's Final Brief* at 17, 23 n.4, 24 n.5, and 28. The Sixth Circuit refused to consider these issues.

administrator must adopt an appropriate description of the claimant's occupation. *Gallagher*, 305 F.3d at 270-271. Further, the Court held that a "general job description of the DOT, to be applicable, must involve comparable duties but not necessarily every duty." *Id.* at 272. Here, the Sixth Circuit ruled that the Hartford could utilize the DOT to describe Mr. Osborne's occupation as the President of a Financial Institution—a description that does not involve comparable duties whatsoever.

The Sixth Circuit also declined to consider Mr. Osborne's argument that the Hartford should have used a comparable description in the DOT, specifically, Sales Agent, Insurance. The Sixth Circuit's ruling appeared to be its only way to avoid this issue, because Mr. Osborne timely raised this argument.

Hartford even recognized this argument in Osborne's opening brief. *See Appellee's Brief* at 38 n.6. Hartford stated "although Osborne suggests that Hartford selected the wrong DOT classification by looking at 'President, Any Industry' and 'President, Financial Institution,' he has failed to identify a better analog." *Id.* In reply, Osborne identified a better analog, specifically, "Sales Agent, Insurance." *Appellant's Reply Brief* at 22-23. The Sixth Circuit avoided this critical issue which is at the heart of this petition by declining to consider the argument. Instead, the Sixth Circuit held that the Hartford reasonably utilized the DOT to classify Mr. Osborne's occupation as the President of a Financial Institution, which has no comparable duties to that of Mr. Osborne's actual occupation. Thus, the decision conflicts with *Gallagher v. v. Reliance*, 305 F.3d 264 (4th Cir. 2002) and other circuits and should be reversed.

REASONS FOR GRANTING THE WRIT

Certiorari is Proper Because The Sixth Circuit Opinion Conflicts on an Important and Recurring Question of ERISA Law with the Holdings of the United States Court of Appeals for the First, Second, Third, and Fourth Circuits and There is Confusion Amongst the District Courts

Congress enacted ERISA to "protect . . . the interests of participants in employee benefit plans and their beneficiaries" by setting out substantive regulatory requirements for employee benefit plans and to "provid[e] for appropriate remedies, sanctions, and ready access to the Federal courts." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004); 29 U.S.C. § 1001(b). "The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans." *Davila*, 542 U.S. at 208 (emphasis added). The uniform construction of terms such as "regular occupation" and "own occupation" in ERISA plans is a fundamental component of that uniform regulatory regime. It is consistent with the "full and fair" review that is to be given to disability benefit determinations under ERISA, and the federal common law Congress "expected" courts would develop. *The Black & Decker Disability Plan v. Nord,* 538 U.S. 822, 830-31 (2003); *Bruch,* 489 U.S. at 110; *Pilot Life Insurance Company v. Dedeaux,* 481 U.S. 41, 56 (1987). It is also consistent with the trust-based fiduciary model this Court has recognized is applicable under ERISA. *Davila,* 542 U.S. 200, 124 S. Ct. at 2504, 159 L. Ed. 2d at 337 (Ginsburg, J., dissenting); *Bruch,* 489 U.S. at 110.

The Sixth Circuit failed to protect the interest of ERISA participants as Congress clearly intended. In this case, the Sixth Circuit failed to comply with any holding of other

United States Courts of Appeals on this same important subject matter, namely the interpretation by an ERISA plan administrator of a claimant's occupation under a disability policy governed by ERISA. Cases in the Third Circuit define "occupation" as the duties of the claimant's specific job, without regard to how the occupation is generally performed in the economy at large. *See Lasser v. Reliance Standard Ins. Co.*, 344 F.3d 381, 386 (3rd Cir. 2003) (finding that the term "regular occupation" unambiguously meant the "usual work that the insured [was] actually performing immediately before the onset of disability" and not a general occupation, and that it was arbitrary to conclude otherwise).

The First, Second, and Fourth Circuits define "occupation" under ERISA plans to include a position of the same general character as the insured's previous job, requiring similar skills and training, and involving comparable duties. *See Tsoulas v. Liberty Life Assurance Company of Boston*, 454 F.3d 69, 78 (1st Cir. 2006) ("a general job description of the DOT, to be applicable, must involve comparable duties but not necessarily every duty"); *Kinstler v. First Reliance Standard Life Ins. Co.*, 181 F.3d 243, 253 (2nd Cir. 1999); *Gallagher v. v. Reliance Standard Life Ins. Co.*, 305 F.3d 264 (4th Cir. 2002).

The holding of the Sixth Circuit allows an ERISA fiduciary to apply a completely arbitrary occupational description, such as the President of a Financial Institution, to describe the occupational requirements of a claimant who is a president of an insurance agency and in essence an insurance salesman. The holding of the Sixth Circuit ultimately allows the Hartford or any ERISA fiduciary to deny an ERISA claimant disability benefits based on its determination that the claimant can perform any occupation of the fiduciaries choosing. The Sixth Circuit failed to require

that at a minimum the determination of an claimant's "occupation" involve comparable duties to the claimant's actual job.

Rule 10 of the Supreme Court of the United States Considerations Governing Review on Certiorari provides in part:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter[.]

(emphasis added). This issue is of extreme importance amongst the federal circuits and under disability plans governed by ERISA. There exists an array of district court and circuit court cases that have determined whether or not ERISA plan fiduciaries have abused their discretion in defining an insured's occupation and subsequently denying benefits.

This same issue is of critical importance in the Social Security arena. Therefore, the Social Security Administration regulations provide that the Commissioner may take administrative notice of the jobs listed in the DOT.[5]

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[5] *See*, 20 CFR §§ 404.1566(d), 416.966(d).

However, there is no such regulation under ERISA, forcing the federal courts to determine over and over again, whether or not the use of the DOT or the description of an insured's occupation is reasonable. This piecemeal review hampers the goals of ERISA and provides inconsistent results for the participants in employee benefit plans. Conformity amongst the circuits is vital to prevent this inconsistency and promote the congressional intent behind ERISA.

The serious and direct conflict between the majority decision of the Sixth Circuit in this case and the decisions of the First, Second, Third, and Fourth Circuits regarding the construction of "regular occupation" or "own occupation" definitely impacts ERISA's uniform regulatory regime. Not only is the Sixth Circuit's decision completely at odds with the holdings of the First, Second, Third, and Fourth Circuits, but there is a conflict among other circuits and district courts on this same important matter regarding ERISA.

The resolution of this conflict should not be avoided or explained away with suggestions that there are variances in the policy language, differences between "regular occupation" and "own occupation" disability provisions, or differences in facts. The central issue surrounding these terms is whether an ERISA fiduciary may define these terms inconsistently across the nation. Reliance Standard Insurance Company, for example, has had many cases on this issue reach the district court and appellate level and the courts have ruled either way depending on the interpretation of the same policy language. For example, *Lasser v. Reliance Standard Ins. Co.*, 344 F.3d 381, 386 (3rd Cir. 2003) requires a claimant's actual job duties to be considered under an "own occupation" policy. However, *Gallagher v. Reliance Standard Life Ins. Co.*, 305 F.3d 264 (4th Cir. 2002) allows a comparable occupation to be considered under a "regular occupation" policy despite the

claimant's actual job duties. Both of these opinions are contrary to the other and Reliance Standard Insurance Company is an ERISA fiduciary in both opinions. It is in the interest of the ERISA health plan participants as well as ERISA fiduciaries that the interpretation of these policy terms is consistent.

The First Circuit holds that for a general job description of the DOT to be applicable, the job description must involve comparable duties of the employee's job, but not necessarily every duty. *Tsoulas v. Liberty Life Assurance Company of Boston*, 454 F.3d 69, 78 (1st Cir. 2006).

The Fourth Circuit's holding is in line with that of the First Circuit. In *Gallagher v. Reliance Standard Life Ins. Co.*, 305 F.3d 264 (4th Cir. 2002), the Court held that in defining an insured's "regular occupation" when that term is not defined in the Policy, the plan administrator must adopt an appropriate description of the claimant's occupation. *Gallagher*, 305 F.3d at 270-271. Further, the Court held that a "general job description of the DOT, to be applicable, must involve comparable duties but not necessarily every duty." *Id.* at 272. In that case, the Fourth Circuit found the administrator's use of the DOT's definition of "editor" in the "printing and publishing industry" and for the position of "vice president" in "any industry" appropriate descriptions of the claimant's job as a corporate officer and publisher of a publishing company, even though his actual job duties required traveling as opposed to the duties found in the applicable DOT descriptions used by the plan administrator. *Id.* at 271-273.

The Second Circuit holds that a plan administrator may not use the DOT to define a claimant's "regular occupation" "without some consideration of the nature of the institution"

where the claimant was employed. *Kinstler v. First Reliance Standard Life Insurance Company*, 181 F.3d 243, 253 (2nd Cir. 1999). In *Kinstler*, the Court found that plaintiff's regular occupation should not be defined so narrowly so as to include only her job, but, rather, the term should encompass that which has the same character as her job. *Id.* at 252-253. As a result, it was found that the defendant incorrectly relied on a more general classification of the plaintiff's regular occupation when it used the DOT to define her occupation. *Id.* The defendant's reliance on the DOT was improper because the DOT classification chosen by the defendant did not reflect the character of her job, as the DOT listed only sedentary tasks, whereas the plaintiff's actual job included non sedentary duties. *Id.*

The Third Circuit has ruled contrary to the First, Second and Fourth Circuits. In the Third Circuit, *Lasser v. Reliance Standard Life Ins.*, 344 F.3d 381 (3rd Cir. 2003), the Court held that it was unreasonable for the plan administrator to define the term "regular occupation" differently from its plain meaning of usual work that insured was actually performing immediately before onset of disability without explicitly including that different definition in the policy. The Court stated that the administrator could not use the DOT to define the insured's occupation because the DOT did not include all of the material duties of the insured's regular occupation—specifically the on-call and emergency duties of an orthopedic surgeon. *Lasser*, 344 F.3d at 387 n.5. The Court agreed with the District Court below which stated:

> Reliance relies heavily on the Department of Labor's DOT definition of the occupation. Whatever may be said for the persuasive effect of this publication in other fields, the Court finds it far too blunt an

> instrument to be instructive as to the material duties of an orthopedic surgeon.

Lasser v. Reliance Standard Life Ins., 130 F. Supp. 2d 616, 624 (D. N.J. 2001).[6]

Additionally, other circuits and district courts conflict on this important issue. In the Ninth Circuit, the Court in *Ehrensaft v. Dimension Works Incorporated Long Term Disability Plan*, 33 Fed. Appx. 908 (9th Cir. 2002) held that the ERISA plan administrator did not abuse its discretion in interpreting "own occupation" in a disability policy to mean the insured's occupation as defined generally by the Department of Labor rather than the insured's specific job. Many district courts hold that a claimant's occupation must reflect his actual job duties. *See, Cunningham v. The Paul Revere Life Ins. Co.*, 235 F. Supp. 2d 746 (W.D.Mich.2002) (holding that defendant's characterization of plaintiff's

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[6] Also in the Third Circuit, *Weinberger v. Reliance Standard Life Ins.*, 54 Fed. Appx. 553 (3rd Cir. 2002) held that:

> Moreover, in assessing Weinberger's inability to perform the material duties of his occupation, Reliance employed the Department of Labor's Description of Occupation Titles, more specifically, its general description of a sales manager's duties. Reliance's utilization of this generic agency description, with its assumption of a sedentary occupation with minimal physical demands, appears inappropriate, particularly in light of Weinberger's provision, along with his disability claim, of a job description setting forth the actual requirements of his position, including his travel requirements.

Weinberger, 54 Fed. Appx. at 556.

occupation as sedentary was not an accurate reflection of his actual occupation); *Shipp v. Provident Life & Acc. Ins. Co.*, 214 F. Supp. 2d 1241 (M.D.Ala.2002) ("While it may have been expedient to match [claimant's] title to a heading in the DOT, the court agrees . . . that [the] evaluation mischaracterized [claimant's] job. . . . [Claimant's] occupation, as it is performed in the national economy, may be more akin to a traveling salesman than to a purely sedentary administrative position."); *Marchetti v. Sun Life Ins. Co. of Canada,* 30 F. Supp. 2d 1001, 1010-11 (M.D.Tenn.1998) (holding it was arbitrary and capricious to discount plaintiff's actual job duties in favor of the job description provided by the employer); *Freling v. Reliance Standard Life Ins. Co.*, 315 F. Supp. 2d 1277, 1288 (S.D.Fla.2004) (holding that when the policy required the plaintiff to be unable to perform his "regular occupation," the defendant could not rely on the DOT definition but instead must determine whether plaintiff could perform the actual duties of his regular occupation); *Ebert v. Reliance Standard Life Ins. Co.*, 171 F. Supp. 2d 726, 735 (S.D.Ohio 2001) (holding that it was unreasonable for the defendant to define "his regular occupation" differently from the ordinary meaning which includes the usual work that the plaintiff was actually performing prior to his disability); *Donnelly v. Guaranty Life Insurance Corporation,* No. CC-96-793, 2001 WL 242573 (S. D. Ohio March 8, 2001) (holding that the correct interpretation of the term "occupation" was the plaintiff's actual duties with his employer); *Sherry v. Hartford Life & Accident Ins. Co.*, 314 F. Supp. 2d 714 (N.D. Ohio 2004) (stating that the administrator's interpretation of "occupation" as how it is performed in the national economy was unreasonable).

Some district courts, however, have held that comparing a claimant's occupation to how it is performed in the national economy is reasonable. *See, Gerhold v. Avondale Indus.,*

Inc., No. 02-3386, 2004 WL 602778, at *11 (E.D.La. Mar.23, 2004) (citations omitted) (concluding that the plan administrator did not abuse its discretion when it interpreted "regular occupation" because "[d]istrict courts have routinely construed the term ... to mean 'a position of the same general character as the insured's previous job, requiring similar skills and training, and involving comparable duties.'"); *Garbers v. Reliance Standard Life Ins. Co.*, No. 3:00CV7652, 2001 WL 1222180, at *3 (N.D. Ohio Sept.24, 2001) (determining that the defendant, when interpreting the term "regular occupation," did not abuse its discretion when it based "its eligibility determination on the general requirements of plaintiff's occupation, rather than on the specific requirements of her actual job"); *Hanser v. Ralston Purina Co.*, 821 F. Supp. 473, 478 (E.D.Mich.1993) (concluding, under an arbitrary and capricious review, "that defendant's interpretation of the terms 'regular occupation' as meaning the type of work which a covered employee is trained to perform rather than the specific job at which the employee was working ... is a rational interpretation supported by the plain meaning of the words"); *Ceasar v. Hartford Life & Accident Ins. Co.*, 947 F. Supp. 204, 207-08 (D.S.C.1996) (concluding that the defendant did not abuse its discretion when it determined that the plaintiff could perform his "own occupation" as it existed in the national economy, as opposed to his particular job which required rotating shift requirements); *Richards v. Hartford Life & Accident Ins. Co.*, 356 F. Supp. 2d 1278, 1287 (S.D.Fla.2004) (citations omitted) ("When the term "occupation" is undefined, courts properly defer to the Department of Labor's Dictionary of Occupational Title's ... definition of the term because insurers issuing disability policies 'cannot be expected to anticipate every assignment an employer might place upon an employee outside the usual requirements of his or her occupation.'"); *Dionida v. Reliance Standard Life Ins. Co.*, 50 F. Supp. 2d

934, 940 (N.D.Cal.1999) (finding that "Reliance erroneously substituted the 'any occupation' standard in lieu of the 'regular occupation' standard" in evaluating plaintiff's claim).

The Sixth Circuit failed to comply with any holding of other United States Courts of Appeals on this same important subject matter, namely that the determination by an ERISA fiduciary of a claimant's occupation under a disability policy governed by ERISA must involve the claimant's actual job duties or comparable job duties. The Sixth Circuit now allows an ERISA fiduciary to deny a claimant disability benefits based upon the fiduciary's determination that the claimant can perform any occupation of the fiduciary's choosing, regardless of the claimant's actual occupation. Additionally, many circuits and district courts conflict over this issue. Accordingly, this issue requires immediate attention by this Court.

CONCLUSION

If ERISA's purpose to protect contractually defined benefits has any meaning at all, the standard for construing "regular occupation" or "own occupation" under ERISA should be the same in every Circuit. Simply stated, this Court should review this case, so ERISA participants and ERISA insurers will know whether "regular occupation" or "own occupation" will be construed using either the common sense, practical construction adopted by the Third Circuit or the more insurer-friendly construction allowed by the First, Second, and Fourth Circuits. In any event, the impossible and unreasonable construction adopted by the Sixth Circuit majority in this case cannot stand.

This conflict is obvious, it is serious, and it can only be resolved by this Court. This conflict must be resolved by this

Court, or thousands, possibly hundreds of thousands, of disabled ERISA insureds will be in severe jeopardy of having their disability claims summarily denied or terminated by insurers like the Hartford using an overly restrictive construction of "own occupation" or "regular occupation." Such a result is hardly consistent with the protection ERISA is supposed to provide to contractually defined disability benefits these ERISA insureds have purchased, and in Mr. Osborne's case, have specifically negotiated to receive.

For the reasons stated herein, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-5536

[Filed January 5, 2007]

BRUCE OSBORNE, *Plaintiff-Appellant*,	)
v.	)
HARTFORD LIFE AND ACCIDENT INSURANCE COMPANY, *Defendant-Appellee*.	)

JUDGES: Before: COLE, GILMAN, and FRIEDMAN*, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

* Hon. Daniel M. Friedman, Senior United States Circuit Judge for the Federal Circuit, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Cole would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ _____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-5536

[Filed October 3, 2006]

BRUCE OSBORNE, *Plaintiff-Appellant*,	)
v.	)
HARTFORD LIFE AND ACCIDENT INSURANCE COMPANY, *Defendant-Appellee*.	)

JUDGES: Before: COLE, GILMAN, and FRIEDMAN, Circuit Judges.* FRIEDMAN, J., delivered the opinion of the court, in which GILMAN, J., joined. COLE, J. (pp. 6-8), delivered a separate dissenting opinion.

* The Honorable Daniel M. Friedman, Circuit Judge of the United States Court of Appeals for the Federal Circuit, sitting by designation.

OPINION

FRIEDMAN, Circuit Judge. The ultimate question in this appeal is whether an insurance company that was both the administrator of a disability benefits plan under the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and the issuer of the disability insurance policy thereunder, justifiably terminated disability benefits based on its determination that the disability had ended. The answer turns principally on the meaning of the insured's "own occupation" as used in the disability insurance policy. The district court upheld the insurance company's application of that term. We affirm.

I

In 1996 the appellant Bruce Osborne was the Chairman of the Board and President of Insurex Agency, Inc, and Insurex Benefits Administrators, Inc. (collectively "Insurex"), which his brief describes as "a small insurance agency and administrative company." Insurex was a wholly-owned subsidiary of TPI Restaurants, Inc., which operates the "Shoney's" chain of restaurants. Osborne was a participant in Shoney's ERISA plan, which included disability insurance. The appellee Hartford Life and Accident Insurance Co. ("Hartford") was both the administrator of the ERISA plan and the issuer of the disability insurance policy. The disability policy provided coverage if Osborne became "Totally Disabled," defined under the plan as "prevented by Disability from doing all the material and substantial duties of your own occupation on a full time basis."

According to the job description, Osborne had the following duties as president of Insurex:

> Responsible for the sales and marketing of new clients that entails extensive traveling. Negotiating with insurance companies on quotes for proposals and renewal rates. Providing customer service and assistance to the existing clients. Meeting with brokers to discuss prospective clients and existing clients. Oversee the internal functions of the company, staff and production issues.

In 1996, Osborne suffered a severe heart attack. He resigned as president of Insurex in that month, but continued as Chairman of the Board. Hartford began disability payments to him. Prior to 1994, Osborne had travelled approximately two weeks out of the month. In the last year of his employment, Osborne curtailed traveling to approximately one week every other month.

Following preliminary and more detailed investigations, Hartford concluded in 2001 that Osborne was no longer disabled and terminated his benefit payments. The preliminary investigation had indicated that Osborne was playing golf and cards at his country club. During the investigation Osborne had told Hartford that he played 70-80 rounds of golf a year. He also had been seen on three occasions playing cards at the country club for several hours.

Hartford wrote Osborne that it intended to terminate his disability benefits "based . . . on policy language and all the documents contained in [Osborne's] claim file . . . ." Hartford stated that it had determined that under the United States Department of Labor's Dictionary of Occupational Titles ("the Dictionary"), Osborne's former position with

Insurex was classifiable as "President, Financial Institution," which was a sedentary position whose work Osborne could perform.

Osborne administratively appealed that decision within Hartford. Hartford then had Dr. Vita, a cardiologist, review Osborne's file. Dr. Vita concluded that Osborne could perform the sedentary work that Hartford had concluded Osborne's position involved. Dr. Vita's conclusion was contrary to that given by Osborne's treating physician, Dr. Newman. Hartford adhered to its decision that Osborne no longer was disabled.

Osborne filed the present suit challenging Hartford's decision in a Tennessee state court. Hartford removed the case to the United States District Court for the Western District of Tennessee pursuant to ERISA's complete preemption provision, 29 U.S.C. § 1144(a).

The district court granted Hartford's motion for judgment on the record and dismissed the case. It ruled that Hartford's reliance upon the Dictionary as a basis for determining the meaning of "own occupation" in the insurance policy was not arbitrary or capricious, and that Hartford's determination that Osborne no longer was disabled was reasonable.

II

Hartford's termination of Osborne's disability payments - because he was once again able to perform the duties of his position and therefore no longer was disabled - rested on the following rulings: (1) the basis for determining his "occupation" was the Dictionary; (2) under the Dictionary his "occupation" was "President, Financial Institution"; and (3) this was a sedentary position whose duties he could perform.

Hartford's determination that Osborne could perform those duties rested on its resolution of conflicting medical opinions.

Osborne's principal contention in this appeal is that Hartford improperly relied on the Dictionary in determining his "occupation." He contends that instead Hartford should have looked to the actual work he performed at Insurex which, he contends, involved substantial travel and required mobility by the performer.

Resolution of this issue implicates ERISA, the ERISA plan and the Hartford disability insurance contract that was part of that plan.

ERISA itself provides no light on the point. It defines "employee welfare benefit plan" and "welfare plan" to include any plan "providing for its participants . . . through the purchase of insurance . . . benefits in the event of . . . disability. . . ." 29 U.S.C. § 1002(1). An insurance company that issues an insurance policy under an ERISA plan may serve as the administrator of the plan, *see Kalish v. Liberty Mutual/Liberty Life Assur. Co. Of Boston*, 419 F.3d 501 (6th Cir. 2005), which is a fiduciary position, *see* 29 U.S.C. § 1104.

The ERISA plan provides for disability insurance coverage. Pursuant to this plan, Hartford issued a group insurance disability policy. The policy provides for payment of benefits during the time an employee is "Totally Disabled." § V, Art. 1. Benefits will be paid until the employee is "no longer Disabled." *Id.*

Section I of the policy defines "Totally Disabled" to mean that

> you are prevented by Disability from doing all the material and substantial duties of your own occupation on a full time basis.

The insurance policy also provides that Hartford "has full discretion and authority to determine eligibility for benefits and to construe and interpret all [of its] terms and provisions." *Id.* The policy, however, does not state the basis upon which Hartford will determine disability, i.e., whether an employee is unable to perform the duties of the employee's "own occupation."

In light of the insurance policy's provisions relating to Hartford's making disability determinations, we conclude that the policy contemplates that Hartford will have broad discretion in determining what is an employee's "own occupation," including the basis for making that determination.

As the district court stated and as Osborne recognized, the ERISA plan in this case, which "gives the administrator . . . discretionary authority to determine eligibility for benefits," is reviewed to determine whether Hartford's action is arbitrary and capricious. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989). This standard applies to Hartford's decision to use the Dictionary to determine Osborne's "own occupation." Here, as the district court ruled, "the policy in this action grants Hartford full discretion and authority to determine eligibility for benefits and to construe the terms of the plan." The district court correctly recognized that "[t]he arbitrary or capricious standard is a 'highly deferential standard of review.' *Yeager v. Reliance Std. Life Ins. Co.*, 88 F.3d 376, 380 (6th Cir. 1996)."

We agree with the district court that Hartford's use of the Dictionary to determine Osborne's "own occupation" was not arbitrary and capricious, but on the contrary was "reasonable." The word "occupation" is sufficiently general and flexible to justify determining a particular employee's "occupation" in light of the position descriptions in the Dictionary rather than examining in detail the specific duties the employee performed. "Occupation" is a more general term that seemingly refers to categories of work than narrower employment terms like "position," "job," or "work," which are more related to a particular employee's individual duties. Although reasonable persons may disagree over the most appropriate methodology for determining a particular employee's "occupation," we cannot say that Hartford transgressed the boundaries of its broad discretion under its insurance policy and the ERISA plan to make disability determinations. *Cf. Gallagher v. Reliance Std. Life Ins. Co.*, 305 F.3d 264, 272 (4th Cir. 2002) (stating that use of a Dictionary job description is an acceptable reference when the description "involve[s] comparable duties").

Apparently this court has no published opinion addressing this issue. Our unpublished opinion in *Schmidlkofer v. Directory Distrib., Assocs.*, 107 Fed. Appx. 631, No. 03-5755, 2004 WL 192184 (6th Cir. August 25, 2004), supports our conclusion here. There, this court noted that "[m]any courts have upheld a plan administrator's interpretation of 'regular occupation' as meaning a general occupation rather than a particular position with a particular employer." *Id.* at 633.

In that case an insurance company had terminated disability benefits because, relying on the Dictionary, it concluded that the employee no longer was disabled since she was able to perform the duties of her "regular occupation" -

the "totally disabled" standard under the policy there involved. This court reversed the district court's rejection of the insurance company's ruling. It held that the insurance company's "interpretation of 'regular occupation' as meaning Schmidlkofer's occupation as a branch manager, rather than her former position at Directory Distributing, is rational in light of the policy's provisions."

The only possibly significant distinction between that case and the present one is that there the policy term was "regular occupation" and here it is "own occupation." That relatively minor difference in language does not warrant a different result. The critical issue in both cases is whether the insurance company acted reasonably and rationally in relying on the Dictionary to determine the employee's "occupation."

Osborne contends that the policy language should be construed against its drafter Hartford. *See University Hosps. v. Emerson Elec. Co.*, 202 F.3d 839, 846-47 (6th Cir. 2000) (applying *contra proferentum* to ERISA contract). We apply the doctrine of *contra proferentum*, however, only if the contract term is ambiguous. *See Perez v. Aetna Life Ins.*, 150 F.3d 550, 557 n.7 (6th Cir. 1998) (en banc).

This case does not involve the interpretation of ambiguous contractual language that should be construed against the drafter of the contract. The dispute before us is not over the meaning of "own occupation," which defines the term "Total Disability," but over the methodology Hartford used to determine Osborne's occupation. Even if the doctrine of *contra proferentum* applies in interpreting ERISA plans, the doctrine does not apply here.

Osborne also argues that Hartford's methodology was arbitrary and capricious because of the inherent conflict of

interest in Hartford's dual role as the administrator of the ERISA plan and the issuer of the insurance policy under the plan. The district court properly rejected this contention because, as recognized in *Peruzzi v. Summa Medical Plan*, Osborne needed to provide "significant evidence" that the alleged conflict of interest influenced Hartford's decision. 137 F.3d 431, 433 (6th Cir. 1998). Osborne has not done so. The sole basis of his conflict of interest claim is the institutional one of Hartford's dual capacity.

III

In his reply brief, Osborne argues that he "is not the President of a Financial Institution, but the president of a small insurance agency and essentially a full-time sales agent." He contends that "The Hartford had available in the [Dictionary] a more accurate description of Osborne's occupation[,]" namely, "Sales Agent, Insurance."

Osborne, who was represented by counsel before both this court and the district court, did not make this argument in his opening appellate brief. There, his argument was that Hartford's denial of Osborne's disability benefits was arbitrary and capricious because Hartford "failed to consider the duties of Mr. Osborne's actual occupation. Mr. Osborne's actual job duties required extensive traveling and extremely long hours," and instead "applied the [Dictionary] definition of 'President, Financial Institution' to describe Mr. Osborne's occupation as one that was 'sedentary.'" (Osborne raised only that question in his "Statement of Issues for Review.") Although Osborne stated that "[t]here was no reason" and "no evidence" for Hartford "to assume that [Hartford's choice of Dictionary definition] described" Osborne's actual job, other than "its conflict o[f] interest," he never argued that this itself was a reason for reversing the district court. Similarly, he did

not make the argument before the district court, which may explain the district court's failure to discuss it. Indeed, his failure to raise the issue there resulted in the lack of a fully developed factual record on the point.

We ordinarily do not entertain an argument first made in a reply brief. *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 318 (6th Cir. 2005). Although this court apparently has recognized an exception to this principle for legal issues, *see, e.g., Logan v. Denny's Inc.*, 259 F.3d 558, 570, n.6 (6th Cir. 2001), Osborne's new argument that he was not the president of a financial institution is primarily factual. *See also Taft Broad. Co. v. United States*, 929 F.2d 240, 243-45 (6th Cir. 1991) (discussing when this court will consider an issue not raised in the district court). Osborne offers no excuse or explanation for his untimely raising the issue. His argument comes too late, and we decline to consider it.

In the first part of his reply brief, under the caption "Standard of Review," Osborne argues at considerable length that, on the merits, Hartford's conclusion that his disability had ended was arbitrary and capricious. Once again, this is a new argument that Osborne had not made in his opening appellate brief which, as noted, challenged as arbitrary and capricious only Hartford's reliance on the Dictionary to determine Osborne's "own occupation." Like his argument that he was not the president of a financial institution, we decline to consider this untimely new contention.

Calvert v. Firstar Finance, Inc., 409 F.3d 286 (6th Cir. 2005), on which Osborne relies in that argument, does not aid him. In *Calvert*, there was no question of the insurance company's reliance on the Dictionary, which it did not do in terminating the employee's benefits. The sole question in *Calvert* was whether, considering all the circumstances, such

termination was arbitrary and capricious. In reversing the district court's ruling in favor of the insurance company, this court decided only that the termination was arbitrary and capricious. This court did not say anything about reliance on the Dictionary as a basis for determining the employee's "own occupation," which was not the issue in *Calvert*.

CONCLUSION

The judgment of the district court dismissing the complaint is affirmed.

DISSENT

R. GUY COLE, JR., Circuit Judge, dissenting. I respectfully dissent because I believe that the plain language of the disability policy compelled Hartford to consider Osborne's actual job duties as President of Insurex in its review of his continued entitlement to benefits. In addition, Hartford has failed to provide a reasoned explanation for its reliance on the Dictionary where the record evidence shows, among other things, that Hartford did not dispute the accuracy or reliability of the job description provided by Osborne, and Hartford admits that there is a discrepancy between the significant travel required by Osborne's actual position and the Dictionary's classification of his occupation as sedentary.

I. STANDARD OF REVIEW

The majority correctly states that our review of Hartford's decision to terminate Osborne's disability benefits is governed by the "arbitrary and capricious" standard. This standard has been described as "the least demanding form of judicial review of administrative action." *Calvert v. Firstar Fin., Inc.*, 409 F.3d 286, 292 (6th Cir. 2005). "When it is possible to

offer a reasoned explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary or capricious." *Id.* (internal citation omitted). However, as we recently noted in *Moon v. Unum Provident Corp.*, 405 F.3d 373, 379 (6th Cir. 2005),

> merely because our review must be deferential does not mean our review must also be inconsequential. While a benefits plan may vest discretion in the plan administrator, the federal courts do not sit in review of the administrator's decisions only for the purpose of rubber stamping those decisions . . . Indeed, deferential review is not no review, and deference need not be abject.

II. DISCUSSION

Osborne's disability policy with Hartford provides that he is eligible to receive long-term-disability payments if he is "totally disabled." Under the policy, "Totally Disabled means you are prevented by Disability from doing all the material and substantial duties of your own occupation on a full time basis." The question is whether, where the policy does not define "your own occupation," it was reasonable for Hartford to fix the meaning of Osborne's "own occupation" by reference to the Dictionary definition for "President, Financial Institution," to the exclusion of Osborne's actual job duties.

As an initial matter, the majority cites this Court's unpublished opinion in *Schmidlkofer v. Directory Distrib. Assocs.*, Inc., 107 Fed. Appx. 631 (6th Cir. 2004), in support of its decision that Hartford did not exceed its discretion in relying on the Dictionary. In *Schmidlkofer*, this Court concluded that it was rational for the defendant insurer to

consult the Dictionary to determine the nature of the plaintiff's occupation, rather than look to her specific duties as manifested in her actual job. *Id.* at 634; but *see Lasser v. Reliance Standard Life Ins. Co.*, 344 F.3d 381, 386 (3d Cir. 2003), *cert. denied*, 541 U.S. 1063, 124 S. Ct. 2390, 158 L. Ed. 2d 963 (2004) (holding that "[b]oth the purpose of disability insurance and the modifier 'his/her' before 'regular occupation' make clear that 'regular occupation' is the usual work that the insured is actually performing immediately before the onset of disability"). The policy language at issue in *Schmidlkofer* was "regular occupation," not "own occupation," like that here. The majority dismisses this distinction as a "relatively minor difference in language [that] does not warrant a different result." I respectfully disagree.

Whatever the meaning of "regular" is, it is not synonymous with "own." *Mizzell v. The Paul Revere Life Ins. Co.*, 118 F. Supp. 2d 1016, 1021 (C.D. Cal. 2000) (commenting, while comparing a disability policy that spoke in terms of the claimant's "regular occupation," with one that spoke in terms of the claimant's "own occupation," that "[i]f anything, the phrase 'regular' seems more general in nature than 'own'"). Used as an adjective, as it is here, "own" means "belonging to oneself or itself"; "used to specify an immediate or direct relationship." *Webster's Third New International Dictionary* 1612 (1986). Construing the policy language according to its "plain meaning in an ordinary and popular sense" then, "own occupation" refers to Osbourne's actual job duties. *Williams v. Int'l Paper Co.*, 227 F.3d 706, 711 (6th Cir. 2000). If it was otherwise, if the policy language really meant the generic responsibilities associated with Osbourne's occupation, there would have been no reason to include the word "own." The same meaning could have been accomplished by couching the definition of "total disability" in terms of "your occupation," rather than "your

own occupation." This Hartford did not do. As a result, it seems to me that we ought not render "own" surplusage by reading it out of the policy language. *See Union Inv. Co. v. Fid. & Deposit Co. of Md.*, 549 F.2d 1107, 1110 (6th Cir. 1977) ("A contract will not be construed so as to reject any words as surplusage if they reasonably can be given meaning."); *see also Cunningham v. The Paul Revere Life Ins. Co.*, 235 F. Supp. 2d 746, 756 (W.D. Mich. 2002) (interpreting "own occupation" in a disability policy as referring to the claimant's actual job duties rather than the general description contained in the Dictionary); *Mizzell*, 118 F. Supp. 2d at 1021-22 (same).

Second, even assuming that the phrase "own occupation" is susceptible to two meanings, Hartford has failed "to offer a reasoned explanation, based on the evidence," for relying on the Dictionary. *Calvert*, 409 F.3d at 292; *see also Lasser*, 344 F.3d at 386 (stating that the policy administrator's interpretation of ambiguous language must be reasonable to be entitled to deference).

As part of its initial review of Osborne's claim for disability benefits, Hartford asked for and received a job description from Osborne. This job description explained that Osborne traveled frequently-approximately two weeks out of every month (curtailed to one week every other month in the year prior to his resignation)-as part of his regular duties. Thus, in 1996 Hartford granted Osborne's claim for disability benefits on a record that included the job description provided by Osborne. Hartford still had Osborne's job description in hand in 2000 when it undertook its evaluation of Osborne's continued entitlement to benefits. Nonetheless, rather than consult Osborne's job description, Hartford researched the occupations in the Dictionary, determined that Osborne's job most closely matched that of "President, Financial

Institution," and because the Dictionary classified "President, Financial Institution" as a sedentary position, Hartford terminated Osborne's benefits on the grounds that he was capable of performing sedentary work.

Hartford does not claim that the job description supplied by Osborne outlining his actual duties was in any way inaccurate or insufficient to enable Hartford to understand the nature of Osborne's responsibilities and assess whether he could return to work as President of Insurex. Hartford aiso does not dispute that Osborne was required to travel regularly to fulfill his duties. In fact, Hartford acknowledges the discrepancy between Osborne's actual travel requirements and the Dictionary's classification of "President, Financial Institution" as sedentary, but insists, without any explanation, that the Dictionary applies: "Although Mr. Osborne's specific job in the occupation of a 'President of a Financial Institution' may have involved traveling, the occupational requirements per the DOT Code, does not require traveling." Finally, the record is devoid of any evidence that business travel is not in fact a typical feature of Osborne's occupation as it is performed by other persons at comparable institutions. *See Kinstler v. First Reliance Standard Life Ins. Co.*, 181 F.3d 243, 253 (2d Cir. 1999) (holding that the institution where the plaintiff was employed had to be considered in defining her "regular occupation"); *Lasser*, 344 F.3d at 387-88 (concluding that survey evidence of other orthopedic surgeons showed that emergency surgery and being on-call were material aspects of the plaintiff's occupation). On these facts, I cannot conclude that Hartford's reliance on the Dictionary was reasonable.

Accordingly, I would reverse and remand to the district court for consideration of whether, in light of Osborne's specific job duties as President of Insurex and the medical

evidence in the record, Hartford's termination of Osborne's disability benefits was arbitrary and capricious.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 02-2140 B

[Filed February 28, 2005]

BRUCE OSBORNE,	)
Plaintiff,	)
	)
v.	)
	)
HARTFORD LIFE AND	)
ACCIDENT INSURANCE COMPANY,	)
Defendant.	)
	)

OPINION BY: J. DANIEL BREEN

OPINION

ORDER GRANTING DEFENDANT'S MOTION TO STRIKE, OR IN THE ALTERNATIVE TO EXCLUDE FROM CONSIDERATION, EXHIBIT "A" TO PLAINTIFF'S RESPONSE, AND GRANTING DEFENDANT'S MOTION FOR JUDGMENT ON THE RECORD

This case involves a claim by Plaintiff, Bruce Osborne, for long-term disability benefits under an employee benefit plan pursuant to the Employees Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001- 1461 ("ERISA"). Osborne is the former president of the Insurex Agency, Inc. and Insurex Benefits Administrators, Inc. (hereinafter collectively referred to as "Insurex"). He withdrew from his position with Insurex due to congestive heart failure and began receiving disability benefits in 1996 under the terms of an insurance policy from Defendant, Hartford Life and Accident Insurance Company ("Hartford"). Five years later, Hartford reviewed Osborne's claim records and determined that he no longer qualified under its policy to receive long-term disability benefits. Plaintiff appealed the decision without success. In the instant action, Osborne seeks review of the plan administrator's decision to discontinue his coverage. Hartford has filed a motion for judgment on the record. Also pending before the Court is the Defendant's motion to strike, or in the alternative, to exclude from consideration exhibit "A" to Plaintiff's response to Hartford's motion.

FACTS

The following facts are taken from the administrative record filed on January 28, 2003. *See Miller v. Metro. Life Ins. Co.*, 925 F.2d 979, 986 (6th Cir. 1991) (holding that when a court reviews a denial of ERISA benefits, it may generally consider only the evidence available to the administrator at the time of the final decision). As an employee of Insurex, Osborne was covered under group insurance policy number GLT-033342 issued by Hartford to TPI Restaurants, Inc., the parent company of Insurex. (Administrative Record at 6, 154; hereinafter "R. at ".) In May 1996, Plaintiff was diagnosed with congestive heart failure and thus, discontinued his employment with Insurex.

(R. at 167-69.) He then applied to Hartford for long term disability benefits, which Defendant approved. In July 2000, Hartford began its annual review of Plaintiff's medical records to ascertain whether he continued to qualify for disability benefits under the policy. (R. at 294.) In order to receive benefits, the policy required that Plaintiff be totally [illegible] defined as being "prevented by the [illegible] the material and substantial duties of [illegible] on a full time basis." (R. at 600.) Under the policy, Hartford would pay benefits until Osborne was no longer disabled or failed to prove that he was disabled. (R. at 622.)

During its review, Hartford sent Osborne a letter on July 7, 2000 requesting that he provide proof of continued disability and complete a questionnaire and release. (R. at 294.) In the questionnaire, Plaintiff failed to answer whether he now participated in any activities that he participated in prior to his disability. (R. at 291.) However, he did state that his condition had not improved in the last 18 months. (R. at 291.) Dr. Kevin Newman, Plaintiff's physician, completed the statement of disability and listed his diagnosis as dilated cardiomyopathy with symptoms of "fatigue with exertion." (R. at 239-40.) Dr. Newman further noted that Plaintiff could not stand for more than two hours continuously, could not walk more than thirty minutes at a time, and could not lift more than twenty pounds. (R. at 240.) When answering the questions of whether Osborne could reach, push, pull, drive, use a keyboard, or perform repetitive hand motions, Dr. Newman stated "no limit" to each. (R. at 240.) Dr. Newman also stated that the Plaintiff should avoid extreme temperatures and that Plaintiff's limitations would last "indefinitely." (R. at 240.)

From September through November 2000, Hartford employed an investigator to further examine Plaintiff's functional capacities. (R. at 41.) On October 3 and 4, the investigator observed Plaintiff at Colonial Country Club (Memphis, Tennessee) playing cards over a five hour period. (R. at 222-24.) Plaintiff was also seen playing golf which the investigator videoed. (R. at 225-26.) Osborne was reported to bend and lean as well as twist his body without appearing to be in any pain. (R. at 225.) On November 1 and 2, the Plaintiff was seen parking at Insurex in the spot reserved for "Bruce Smith." (R. at 228.) The investigator again saw Plaintiff on November 2 playing cards at Colonial Country Club for over three hours. (R. at 228-29.) Hartford referred all of this information to a registered nurse, who upon review, concluded that Osborne could perform sedentary work. (R. at 46.)

Hartford contacted Osborne in early 2001 in an attempt to obtain a current medical update. (R. at 155.) During that conversation, Plaintiff stated that he had an appointment with his doctor for a test that should have been performed several months earlier. (R. at 155.) On January 24, 2001, Hartford interviewed Osborne with his attorney present. (R. at 40.) Plaintiff stated that he played 70 to 80 rounds of golf a year and continued as the chairman of the board of Insurex. (R. at 156.) In that position, Plaintiff related that he spoke to customers and underwriters of Insurex as well as reviewed financial statements and sales and marketing objectives of the company. (R. at 156-60.) He gave a written statement indicating that his condition had deteriorated causing more difficulty breathing, but noted that he had responded favorably to medication, which resulted in his being taken off a heart transplant list. (R. at 157-58.) His limitations included inability to bend over to tie his shoe and restricted to walking four blocks per day. However, Osborne reported that he

could sit, twist, and balance himself without any trouble. (R. at 158-59.) Osborne also stated

> I walk as little as possible. I basically sit in my chair and walk to my car and drive where I need to go and then I sit down... . . . If it is a nice day I might play golf with a cart. I have a medical flag that allows me to drive across the fairways to get to my ball... . . . I am able to drive the cart right up to where my ball is lying [sic]. I find that the short walk to the ball from the cart and hitting the ball does not exert that much physical activity that causes lightheadedness and dizziness. When I pick up my ball I do not stay in that position for a time long enough to get dizzy. When it gets real hot I can not play. . . . Besides golf I travel for leisure a couple times a year... . . . There is no way that I could do what I did before... . . . My job required me to travel a lot and work long days... . . . I have not done any work or volunteer in any work since I filed for disability.
>
> (R. at 158-60.)

During the interview, the Defendant's representative asked Osborne to provide financial information, including an executed Internal Revenue Form 4506, allowing Hartford to obtain his federal tax records. (R. at 157.) According to Hartford's report of the interview, Plaintiff became "red in the face" and stated that his wife, who was a physician, would be concerned about the confidentiality of her business earnings. (R. at 157.)

Several days later, Defendant wrote Dr. Newman, asking for Osborne's medical records after June 1, 2000. The requests were repeated on March 5, 14, 19, 20, and 22, but

without success. (R. at 40.) Osborne eventually submitted the Internal Revenue form in an altered state which allowed the Defendant to obtain W-2 Forms but not Plaintiff's 1040 Forms. (R. at 162.) Thereafter, Hartford requested that Plaintiff submit an unaltered 4506 Form. (R. at 42.) In response, Osborne's attorney forwarded selected copies of schedules from 1996-1999 tax years. (R. at 205.) However, none of these documents contained the first two pages of Form 1040 which would reflect whether Plaintiff indicated he was not working. (R. at 205-15.)

After reviewing the documents submitted by Plaintiff and his doctor, Hartford determined that Osborne no longer qualified as disabled under the terms of the policy and issued a letter terminating his benefits as of March 1, 2001. (R. at 72.) The letter explained that Plaintiff's job as president of a company was classified as "sedentary" pursuant to the United States Department of Labor Dictionary of Occupational Titles ("D.O.T."). (R. at 74-75.) In response to the termination letter, Plaintiff's attorney informed Hartford that the decision would be appealed and requested additional information regarding why Osborne's job was determined to be "sedentary." (R. at 121.) Hartford sent to Plaintiff a copy of the occupational job description and analysis reports published in the D.O.T. which classified the job of "President of a Financial Institution" or "President, Any Industry" as a sedentary position. (R. at 75, 119.)

Shortly thereafter, Hartford received medical records previously requested from Dr. Newman. (R. at 38.) A registered nurse reviewed the records and concluded that Plaintiff's condition was not severe enough to preclude him from working. (R. at 38.)

On May 4, 2001, Plaintiff appealed Hartford's determination and argued that his actual duties and responsibilities should be used to determine whether his position qualified as sedentary. (R. at 101.) In his letter, Osborne argued that the insurance policy defined "total disability" as being unable to perform "all the material and substantial duties of your (emphasis added) own occupation on a full time basis." (R. at 102 (emphasis in original).) Additionally, Plaintiff pointed to an April 24, 2001 letter from Dr. Newman which stated that he "would not advise that he [Mr. Osborne] engage in **any** occupation at this time, even the most sedentary." (R. at 102 (emphasis in original).)

On July 26, 2001, Hartford assigned Plaintiff's medical file for review by an independent cardiologist, Dr. Joseph Vita. (R. at 99.) After referring the case, Hartford received the April 24 letter from Dr. Newman. (R. at 94.) In the letter, Dr. Newman stated that Osborne "has signs and symptoms of congestive heart failure, with left ventricular systolic dysfunction, as measured by echocardiography, combined with glucose intolerance or diabetes mellitus and an extreme sensitivity to diuretics." (R. at 97.) Several days later, Dr. Vita, after reviewing Plaintiff's file, contacted Dr. Newman by phone. (R. at 84.) According to Dr. Vita, Dr. Newman reported that Plaintiff "has had stable symptoms for several years, except for the transient period of worsened pulmonary congestion in early 2001," placed no limitations on Osborne's travel abilities, and stated "that there would be no reason to prohibit the claimant from performing sedentary work." (R. at 86-87.) After talking with Dr. Newman and considering the Plaintiff's medical records and his statement as well as the video surveillance, Dr. Vita concluded that, although Osborne "ha[d] reduced functional capacity compared to normal, and indeed his long-term prognosis [wa]s poor," his impairment

at the present time and during the past several years was only mild to moderate. (R. at 88.) Dr. Vita further stated

> [o]n a medical basis, I disagree with Dr. Newman's assessment that the claimant cannot perform sedentary work... . . . . There is little doubt that the functional capacity displayed in the surveillance video and report would permit the claimant to do the sedentary work required to perform his previous job, including travelling [sic] every other month.
>
> (R. at 88.)

Additionally, Dr. Vita determined that the diabetes mellitus and sensitivity to loop diuretics would not affect Osborne's ability to perform sedentary work. (R. at 88.) Based on Dr. Vita's conclusions, Hartford issued its third and final letter of denial to Plaintiff on September 13, 2001, finding that he could perform his job at Insurex. (R. at 77-79.)

In addition to his claims under ERISA, Osborne also included actions under Tennessee law for breach of contract and breach of duty of good faith and fair dealing. However, as the Court noted in its order dated January 8, 2004, those claims clearly "relate to" the policy for purposes for ERISA, and therefore, are preempted by ERISA. *See Hardy v. Midland Enters., Inc.*, 66 Fed. Appx. 535, 2003 WL 2007940, at *3-4 (6th Cir. 2003) (state breach of contract claim preempted by ERISA); *Little v. UNUM Provident Corp.*, 196 F. Supp. 2d 659, 666 (S.D. Ohio 2002) (claims against insurer for denial of benefits based on state duty to deal in good faith preempted). Thus, to the extent any assertions other than those under ERISA are before the Court,

those claims are DISMISSED.[1] The Court will now turn to the remaining motions.

ANALYSIS

I. Defendant's Motion to Strike Plaintiff's Exhibit "A".

On October 22, 2004, Defendant filed a motion for judgment on the record to which Plaintiff submitted a response. Attached to the response as exhibit "A" was a letter written by Dr. Newman on January 20, 2004, providing an update on Osborne's condition. In its motion to strike, Hartford argues that under the case law of the Sixth Circuit, the Court can only consider evidence contained in the administrative record. Plaintiff has not responded to Hartford's motion and the time for responding has expired.

When conducting a review of an ERISA benefits denial, a court is "required to consider only the facts known to the plan administrator at the time he made his decision." *Yeager v. Reliance Standard Life Ins. Co.*, 88 F.3d 376, 381 (6th Cir. 1996); *Miller v. Metro. Life Ins. Co.*, 925 F.2d 979, 986 (6th Cir. 1991) ("when reviewing a denial of benefits under ERISA, a court may consider only the evidence available to the administrator at the time the final decision was made"); *Adkins v. UNUM Provident Corp.*, 191 F. Supp. 2d 956, 960 (M.D. Tenn. 2002) (same). In its motion, Plaintiff relies on and attaches as an exhibit Dr. Newman's letter which provides an update on Osborne's condition. However, the

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[1] In his response to Hartford's motion for judgment on the record, Plaintiff also concedes that such claims are preempted. (Resp. Supp. Mem. Law Reply Hartford Life and Ins. Co.'s Mot. J. R. at 24.)

letter was dated and submitted long after the administrative record regarding Hartford's denial of benefits was closed. Accordingly, because the Court can only consider the evidence available to the administrator at the time of his decision, Defendant's motion to strike exhibit A and all references to it in Plaintiff's response is GRANTED.[2]

II. Defendant's Motion for Judgment on the Record.

A. Standard of Review.

A denial of benefits under 29 U.S.C. § 1132(a)(1)(B) is to be reviewed under a de novo standard, unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. *Williams v. Int'l Paper Co.*, 227 F.3d 706, 710-11 (6th Cir. 2000) (citations omitted). Where an ERISA plan expressly affords discretion to a plan trustee to make benefit determinations, a court reviewing the plan administrator's actions applies an arbitrary and capricious standard of review. *Id.* As the Plaintiff has conceded, the Court must review Hartford's denial of benefits under the arbitrary and capricious standard because the policy in this action grants Hartford full discretion and authority to determine eligibility for benefits and to construe the terms of the plan. (R. at 613.) Under this standard, the Plaintiff bears the burden of proof. *Dowden v. Blue Cross & Blue Shield of Texas*, 126 F.3d 641, 644 (5th Cir. 1997); *Bowen v. Central States, Southeast and Southwest Areas Health and Welfare Fund*, 1992 U.S. App.

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[2] Rule 12(f) of the Federal Rules of Civil Procedure permits the Court on motion made by a party or on its own initiative to strike "any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f).

LEXIS 10816, No. 91-3981, 1992 WL 92832, at *3 (6th Cir. May 6, 1992) (holding that the decision must be sustained unless plaintiff can prove that the actions were arbitrary or capricious); *Brandon v. Metro. Life Ins. Co.*, 678 F. Supp. 650, 655 (E.D. Mich. 1988) (deciding that plaintiff failed to establish that the actions were arbitrary or capricious).

The arbitrary or capricious standard is a "highly deferential standard of review." *Yeager v. Reliance Std. Life Ins. Co.*, 88 F.3d 376, 380 (6th Cir. 1996). It is the least demanding form of judicial review of administrative action. *Williams*, 227 F.3d at 712. When reviewing a decision under this standard, a court must decide whether the plan administrator's determination was rational in light of the plan's provisions. *Id.* Stated differently, when it is possible to offer a reasoned explanation based on the evidence for a particular outcome, that outcome is not arbitrary or capricious. *Id.*; *Raskin v. UNUM Provident Corp.*, 121 Fed. Appx. 96, 2005 WL 271939, at *2 (6th Cir. 2005). The fact that a contrary conclusion could have been reached does not afford a basis to override the committee's decision. *Whitehead v. Federal Express Corp.*, 878 F. Supp. 1066, 1070 (W.D. Tenn. 1994).

Plaintiff argues that there is a conflict of interest in this case because "Hartford is both the plan administrator deciding eligibility and the insurance company ultimately responsible for paying the claim." (Resp. Supp. Mem. Law Reply Hartford Life and Accident Ins. Co.'s Mot. J. R. at 3 ("Pl.'s Resp.").) Conflicts of interest generally arise when an insurance company which administers an ERISA plan pays benefit claims out of its own assets. *See Miller*, 925 F.2d at 984-85 (finding a conflict of interest in an insured's ERISA benefit plan); *Brown v. Blue Cross & Blue Shield of Ala.*, 898 F.2d 1556, 1559-68 (11th Cir. 1991)(discussing conflicts of

interest in the ERISA context for insured and uninsured plans). Consequently, the insurance company's "fiduciary role lies in perpetual conflict with its profit-making role as a business, and the conflict of interest is substantial." *Miller*, 925 F.2d at 984. A conflict of interest can also arise if the plan administrator is controlled by the entity funding the plan. *University Hosps. of Cleveland v. Emerson Elec. Co.*, 202 F.3d 839, 846 (6th Cir. 2000). If the benefit plan administrator has a conflict of interest in deciding claims, then the court must take that conflict into account when reviewing the administrator's decisions. *Miller*, 925 F.2d at 984 (considering the conflict of interest inherent in the defendant's benefit plan).

The Defendant does not argue that a potential conflict of interest does not exist but instead asserts that the Plaintiff has not presented any evidence showing that a conflict of interest actually influenced its decision to terminate Osborne's benefits, as required by the case law. In *Peruzzi v. Summa Med. Plan*, 137 F.3d 431, 433 (6th Cir. 1998), the Sixth Circuit stated that where a "review of the record reveals no significant evidence that [the defendant] based its determination on the costs associated with [the claimant's] treatment or otherwise acted in bad faith, we cannot conclude that [the defendant] was motivated by self-interest." "Mere allegations of the existence of a structural conflict of interest are not enough; there must be some evidence that the alleged conflict of interest affected the plan administrator's decision to deny benefits." *Gough v. Metro. Life Ins. Co.*, 2003 U.S. Dist. LEXIS 25252, No. 3:03-0158, 2003 WL 23411993, at *9 (M.D. Tenn. Nov. 21, 2003) (citing *Peruzzi*, 137 F.3d at 433). In this case, Osborne has merely made allegations regarding the Defendant's potential conflict of interest and has

presented no evidence to support his assertions.[3] Thus, the Court is unable to conclude that the Defendant's decision to terminate the plan was actually motivated by self-interest. *See Peruzzi,* 137 F.3d at 433. Even considering Hartford's potential conflict of interest as a factor in the arbitrary and capricious standard, the Court finds that it is not decisive in the outcome of this case.

B. Hartford's Decision to Terminate Osborne's Coverage.

Plaintiff seeks to recover from the Defendant for wrongfully terminating his benefits under 29 U.S.C. §§ 1132(a)(1)(B) and 1132(a)(3). Section 1132(a)(1)(B) allows a beneficiary to "recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." Similarly, § 1132(a)(3) allows a beneficiary to bring a civil action to "enjoin any act or practice which violates any provision of this subchapter or the terms of the plan" or "obtain other appropriate equitable relief." Defendant argues that because Plaintiff has a cause of action under § 1132(a)(1)(B), Plaintiff's claim under § 1132(a)(3) should be dismissed.

When an ERISA plan participant has a remedy under§ 1132(a)(1)(B), he may not seek equitable relief under the "catchall" provision of § 1132(a)(3). *Wilkins v. Baptist Healthcare Sys. Inc.*, 150 F.3d 609, 616 (6th Cir. 1998)

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[3] Osborne attempted to seek discovery on several issues including Hartford's possible conflict of interest. However, on July 29, 2004, Magistrate Judge Diane Vescovo entered a protective order and found that "Osborne's allegation of conflict of interest, without more, does not warrant additional discovery." The Plaintiff did not appeal that ruling.

(holding that "[t]he Supreme Court clearly limited the applicability of § 1132(a)(3) to beneficiaries who may not avail themselves of § 1132's other remedies"); *see also Varity Corp v. Howe*, 516 U.S. 489, 512, 116 S. Ct. 1065, 1078, 134 L. Ed. 2d 130 (1996) (stating that the structure of § 1132 "suggests that [the] 'catchall' provisions act as a safety net, offering appropriate equitable relief for injuries caused by violations that [§ 1132] does not elsewhere adequately remedy"); *Marks v. Newcourt Credit Group, Inc.*, 342 F.3d 444, 454 (6th Cir. 2003) (An ERISA plan participant "cannot seek equitable relief...under the catchall provision of [§ 1132(a)(3)] if the alleged violations are adequately remedied under other provisions of [§ 1132]."); *Hill v. Blue Cross and Blue Shield of Mich.*, 299 F. Supp. 2d 742, 750 (E.D. Mich. 2003) (same). Therefore, because § 1132(a)(1)(B) allows Plaintiff to recover benefits due him and enforce his rights under the terms of his plan, he cannot pursue a claim for injunctive relief under § 1132(a)(3). Section 1132(a)(3) is a "catchall" provision provided for those who do not have remedies available under any other subsection of § 1132, which is not the case here. *See Wilkins*, 150 F.3d at 616. Accordingly, the Court DISMISSES Osborne's claim under 29 U.S.C. § 1132(a)(3).

The Court now turns to the primary issue before the Court which is whether Hartford acted arbitrarily and capriciously in terminating Plaintiff's benefits. Osborne argues that the Defendant incorrectly relied on the D.O.T. standard to determine if he could perform his job at Insurex. He asserts that the correct standard is that of "his own occupation" pursuant to the terms of the contract and submits that Hartford should have utilized that definition as opposed to the one found in the D.O.T. regulations. (Pl.'s Resp. at 4.) Plaintiff primarily relies on the decision of *Cunningham v. The Paul Revere Life Ins. Co.*, 235 F. Supp. 2d 746 (W.D. Mich.

2002). In Cunningham, the plaintiff had suffered two heart attacks and was diagnosed with significant ischemic cardiomyopathy. *Id.* at 748. The plaintiff's doctor opined that he was "clearly incapable of working" and was "unable to work for any reason and at any level." *Id.* at 749. Nevertheless, the defendant insurance company terminated plaintiff's ERISA policy which gave the defendant exclusive discretion to determine eligibility for coverage and to interpret the terms of the policy. *Id.* at 749-50. The policy required plaintiff to be totally disabled from the "employee's own occupation." *Id.* at 751. The defendant canceled plaintiff's benefits finding that his job was classified as sedentary under the D.O.T. definition and that he could perform such a job. *Id.* at 753. In contrast, plaintiff's doctor stated that there were absolutely no jobs that he would be able to perform. *Id.* at 755. The court found that defendant's characterization of plaintiff's occupation as sedentary was not an accurate reflection of his occupation and found defendant's decision to terminate the policy was arbitrary and capricious "because it [was] not a reasonable interpretation of the plan and [was] not based on the evidence." *Id.* at 755. The court further noted that the defendant's doctor "completely ignore[d] the fact that [p]laintiff only became clinically stable when he was away from the stresses of his occupation" and "ignore[d plaintiff's doctor's] explanation that when he said [p]laintiff was 'doing well,' it was in the context of someone in [p]laintiff's serious medical condition." *Id.*

The Plaintiff also cites to other cases which he claims support his position. In *Shipp v. Provident Life & Acc. Ins. Co.*, 214 F. Supp. 2d 1241 (M.D. Ala. 2002), the court stated that the insurance company

> only looked at [plaintiff's] ability to work from the perspective of physical requirements-as if [plaintiff's]

> ability to work could be judged solely with respect to the degree of manual labor he might be required to perform. Can [plaintiff] sit at a desk on a full-time basis? Probably. [Plaintiff's treating physician's] conclusion that [plaintiff] was disabled, however, took into account the overall effect that [plaintiff's] occupation was likely to have on his already precarious situation.

Id. at 1249. Plaintiff also relies on *Marchetti v. Sun Life Assur. Ins. Co. of Canada.*, 30 F. Supp. 2d 1001, 1010-11 (M.D. Tenn. 1998), in which the court held it was arbitrary and capricious to discount plaintiff's actual job duties in favor of the job description provided by the employer. Similarly, although applying a more stringent standard of review than applicable here, the court in *Freling v. Reliance Standard Life Ins. Co.*, 315 F. Supp. 2d 1277, 1288 (S.D. Fla. 2004), held that when the policy required the plaintiff to be unable to perform his "regular occupation," the defendant could not rely on the D.O.T. definition but instead must determine whether plaintiff could perform the actual duties of his regular occupation. *See also Lasser v. Reliance Standard Life Ins. Co.*, 344 F.3d 381, 386 (3d Cir. 2003) (holding that it was unreasonable for the defendant to define "his regular occupation" differently from the ordinary meaning which includes the usual work that the plaintiff was actually performing prior to his disability); *Ebert v. Reliance Standard Life Ins. Co.*, 171 F. Supp. 2d 726, 735 (S.D. Ohio 2001) (same).

Conversely, Hartford argues that the following cases support its interpretation of "own occupation." In *Ehrensaft v. Dimension Works Inc. Long Term Disability Plan*, 120 F. Supp. 2d 1253, 1258-59 (D. Nev. 2000), the court held that the defendant was reasonable in interpreting "his own

occupation" using the D.O.T. standard instead of determining whether plaintiff could perform the specific duties which his job entailed. The court stated that the "term, 'occupation,' is a general description, not a specific one." *Id.* at 1259. Further, the court reasoned that the "insurer cannot be expected to anticipate every assignment an employer might place upon an employee outside the usual requirements of his or her occupation. A person may not be able to perform a specific job assignment, but still be able to perform the duties generally understood to be part of his or her 'occupation.'" *Id.* Otherwise, "employers and employees [would be able] to arrange for some physically impossible task which the employee is unable to perform and then, based upon that inability, declare the employee totally disabled." *Id.* Likewise, in *Ceasar v. Hartford Life and Accident Ins. Co.*, 947 F. Supp. 204, 207 (D.S.C. 1996), the court found the defendant's denial of ERISA benefits under the policy was reasonable when it determined that the plaintiff would not be prevented from performing "his own occupation" if there "were no rotating shift requirements." The plan administrator cited a labor market survey which stated that plaintiff's occupation did not require the employee to rotate shifts even though plaintiff's current employer required him to do so. *Id.* Defendant argues that the Sixth Circuit has also applied such analysis in *Schmidlkofer v. Directory Distrib., Assocs.*, 107 Fed. Appx. 631, 2004 WL 1921184, at *2 (6th Cir. 2004), where the court held that "[the insured's] regular occupation" was reasonably interpreted by the defendant using the D.O.T. definition which defined plaintiff's job as sedentary. The court concluded that the defendant's "interpretation of 'regular occupation' as meaning [plaintiff's] occupation as a branch manager, rather than her former position at [her actual job], is rational." 107 Fed. Appx. 631, at *2. Furthermore, Hartford cites *Vantreese v. Jackson Madison County Gen. Hosp. Dist.*, No. 97-1241, at 8-10 (W.D. Tenn. Mar. 23,

1997), in which Chief Judge James Todd of this District held that the defendant's interpretation of "your regular occupation" was not arbitrary or capricious in determining that plaintiff could perform the occupation of registered nurse even though her specific job was orthopaedic registered nurse. *Id.* (citing *Hanser v. Ralston Purina Co.*, 821 F. Supp. 473, 478 (E.D. Mich. 1993)). The court reasoned that "[p]laintiff's occupation was that of registered nurse [while] her specific job was that of an orthopaedic registered nurse." *Id.* (emphasis in original). Similarly, Hartford relies on *Hanser*, in which the plaintiff argued that "regular occupation" should be defined as his specific job within the company. *Hanser*, 821 F. Supp. at 478. The court stated that it could not "say that his interpretation of the terms 'regular occupation' [was] wrong ... [but was] still simply one interpretation." *Id.* The court then concluded that the defendant's contrary interpretation of the terms "as meaning the type of work which a covered employee is trained to perform rather than the specific job" was a rationale interpretation. *Id.*

Reviewing Defendant's decision under an arbitrary and capricious standard and even considering Hartford's potential conflict of interest as a factor, the Court finds that Hartford's interpretation of "own occupation" is not arbitrary or capricious. Although Cunningham on which Plaintiff relies is persuasive in finding that "own occupation" requires a plan administrator to consider a plaintiff's actual occupation rather than the D.O.T. definition, see *Cunningham*, 235 F. Supp. 2d at 755, it is still simply one interpretation of "own occupation." See *Hanser*, 821 F. Supp. at 478. The court in Cunningham based its decision not only in finding that the defendant's interpretation of the policy was arbitrary and capricious but also in finding that its decision was contrary to the weight of the evidence. See *id.* at 755. Unlike the case here where Plaintiff's doctor stated to Dr. Vita that Plaintiff

could perform sedentary work, (R. at 86-87), the plaintiff's doctor in *Cunningham* found that he was incapable of working at any level. *Id.* at 749. Even accepting Dr. Newman's contradictory suggestion in his April 24, 2001 letter that Plaintiff not engage in any level of work, the evidence is simply more equivocal than was the case in *Cunningham*. Additionally, Osborne never provided to Hartford his Form 1040 proving that he was not working. (R. at 157, 42, 205-15.) Moreover, when considering that the policy gave exclusive authority and discretion to Hartford to determine whether Plaintiff qualifies for benefits, the Court is not persuaded that the weight of the evidence is contrary to Defendant's determination.

Although Plaintiff's other cases seem to support his interpretation of "own occupation," the Court is persuaded that the more prudent approach is not to usurp the discretion given to the plan administrator to interpret the policy. The term "occupation" is a general term which could be rationally interpreted by using the general definition contained in the D.O.T. See *Ehrensaft*, 120 F. Supp. 2d at 1259 (stating that "occupation[] is a general description"). Hartford could have used the terms "own actual job" which would have given Defendant less latitude to interpret the terms in a reasonable manner. *See e.g., Vantreese*, No. 97-1241, at 8-10 (stating that "[p]laintiff's occupation was that of registered nurse [while] her specific job was that of an orthopaedic registered nurse") (emphasis in original). Further, this conclusion is consistent with the Sixth Circuit's decision in *Schmidlkofer* which held that using the D.O.T. definition to interpret the terms "his regular occupation" was rational. *See Schmidlkofer*, 107 Fed. Appx. 631, 2004 WL 1921184, at *2. Although the terms "his regular occupation" could be distinguished from "his own occupation," the terms used in Hartford's policy are still subject to interpretation and the

Defendant has the discretionary authority to interpret the policy. See *Hanser*, 821 F. Supp. at 478 (stating that the plaintiff's interpretation "is still simply one interpretation" and concluded that the plan administrator's contrary interpretation was not arbitrary or capricious). Even considering the conflict of interest as a factor in Hartford's interpretation of the policy, the interpretation is still rational and the evidence remains equivocal. "We simply ask whether it is possible for [the plan administrator] to offer a reasoned explanation for its denial." *Raskin*, 121 Fed. Appx. 96, 2005 WL 271939, at *4. Plaintiff makes much of the fact that Dr. Vita did not personally examine him before reaching a conclusion. However, the policy does not require Hartford to personally examine Osborne before terminating his benefits. *See Jackson v. Metro. Life*, 24 Fed. Appx. 290, 2001 WL 1450811, at *3 (6th Cir. 2001); *see also Gooden v. Provident Life & Accident Ins. Co.*, 250 F.3d 329, 335 n.9 (5th Cir. 2001) (citing *Meditrust Fin. Servs. Corp. v. Sterling Chems., Inc.*, 168 F.3d 211, 215 (5th Cir. 1999)).

Plaintiff also argues that because he has been declared disabled for purposes of receiving social security benefits, he should be found disabled under the policy. Although a court can consider a Social Security Administrator's disability determination, such a decision is not binding on the court. *Napier v. Hartford Life Ins. Co.*, 282 F. Supp. 2d 531 (E.D. Ky. 2003); *see also Raskin*, 121 Fed. Appx. 96, 2005 WL 271939, at *4 (noting that "benefits determinations under the Social Security Administration follow a different set of procedures than ERISA claims because the procedures are designed to meet the need of efficiently and uniformly administering a large system"); *Hurse v. Hartford Life & Accident Ins. Co.*, 77 Fed. Appx. 310, 2003 WL 22233532, at *6-7 (6th Cir. 2003) (stating that a Social Security Administrator's decision is not controlling because it applies

different standards for determining whether a person has a disability as well as applies different rules such as the "treating physician rule" which cannot be applied in ERISA cases). Even in light of the nonbinding Social Security Administrator's determination that Osborne is disabled, the Court still determines that Hartford's contrary conclusion was rational in light of the evidence before it. *See Williams*, 227 F.3d at 712 (stating that it is not arbitrary and capricious if the plan administrator's denial is rational in light of the plan's provisions). Accordingly, Defendant's motion for judgment on the record is GRANTED.

CONCLUSION

For the reasons articulated herein, Defendant's motion to strike Plaintiff's exhibit A and Defendant's motion for judgment on the record are GRANTED.

IT IS SO ORDERED this 28th day of February, 2005.

J. DANIEL BREEN

UNITED STATES DISTRICT JUDGE

APPENDIX D

No. 05-5536

In The United States Court of Appeals
for the Sixth Circuit

BRUCE R. OSBORNE
Plaintiff-Appellant

v.

HARTFORD LIFE AND ACCIDENT
INSURANCE COMPANY
Defendant-Appellee

On Appeal from the United States District Court
for the Western District of Tennessee Western Division

PETITION FOR PANEL REHEARING AND
SUGGESTION FOR REHEARING *EN BANC*

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Petitioner Bruce Osborne ("Osborne") petitions this Court pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure for a panel rehearing and suggests a rehearing *en banc* of the judgment and opinion of the panel entered in this case on October 3, 2006, the "*Osborne Opinion.*" (attached as Exhibit 1). The panel determined that the Hartford's termination of Osborne's disability benefits under his disability policy (the "Policy") was reasonable. The panel held that Hartford reasonably determined Osborne's "own occupation" was sedentary work, specifically the President of a Financial Institution, by utilizing the Department of Labor's Dictionary of Occupational Titles (the "Dictionary") despite the contrary evidence of Osborne's actual job duties that were not sedentary and despite the fact that Osborne is not the President of a Financial Institution, but an insurance salesman.

STATEMENT OF COUNSEL

The panel's decision conflicts with this Court's opinion in *Williams v. Int'l Paper Co.*, 227 F.3d 706 (6th Cir. 2000) that provides "when interpreting ERISA plan provisions, general principles of contract law dictate that [courts] interpret the provisions according to their plain meaning in an ordinary and popular sense." *Williams*, 227 F.3d at 711; *See also, Perez v. Aetna Life Ins. Co.*, 150 F.3d 550, 556 (6th Cir. 1998). The panel's decision does not utilize this "plain meaning" analysis.

The panel's decision further conflicts with this Court's opinion in *Union Inv. Co. v. Fid. & Deposit Co. of Md.*, 549 F.2d 1107, 1110 (6th Cir. 1977) that "[a] contract will not be construed so as to reject any words as surplusage if they reasonably can be given meaning." The panel's decision rejects the term "own" as surplusage.

Additionally, the panel's decision conflicts with the arbitrary and capricious standard of review. *See Calvert v. Firstar Finance, Inc.*, 409 F.3d 286, 292 (6th Cir. 2005). Under the arbitrary and capricious standard of review, in an ERISA benefits claim the policy administrator's denial of benefits must be reasonable to be entitled to deference. *Id.* The Hartford failed to offer a reasonable explanation for utilizing the Dictionary when it had ample evidence of Osborne's actual job duties that conflicted with the occupational duties in the Dictionary.

Moreover, the panel's decision fails to follow 6th Circuit law of *contra proferentum* in interpreting ERISA plans. Ambiguous ERISA plan language should be construed against the drafter. *University Hosps. v. Emerson Elec. Co.*, 202 F.3d 839, 846-47 (6th Cir. 2000). The doctrine of *contra proferentum* does apply in this matter.[1]

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[1] The panel's decision states that the issue in this case is the methodology Hartford used in determining Osborne's occupation and not the Hartford's interpretation of the term "own occupation." *Osborne Opinion* at *4. Osborne respectfully disagrees. The issue for the Court is whether Hartford's denial was arbitrary and capricious. *See Statement of Issues for Review, Appellant Brief at 2* (stating "Was the Hartford's Denial of Disability Benefits for Mr. Osborne Arbitrary and Capricious . . ."). Osborne's main contention on this issue is that the Hartford should not have utilized the Dictionary to define/interpret Osborne's occupation as the President of a Financial Institution. However, the Hartford's denial is subject to considerable scrutiny by Osborne in his appeal. In support of Osborne's argument that the Hartford's denial was arbitrary and capricious, Osborne argued in his opening brief that 1) he is not the president of a financial institution, but an insurance salesman; 2) his actual job duties should have been considered by Hartford in determining whether he was "Totally Disabled;" 3) Osborne's occupation is not "sedentary;" and 4) it was

Further, the panel's opinion overlooks Osborne's argument that he was not the President of a Financial Institution. *See Appellant's Final Brief* at 17, 23 n.4, and 24 n.5; *see also, Response and Supporting Memorandum of Law in Reply to the Hartford Life and Accident Insurance Company's Motion for Judgment on the Record* at 4, 11, 15, 16, and 24 (attached as Exhibit 2). Therefore, the panel's decision that *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 318 (6th Cir. 2005) and *Taft Broad. Co. v. United States*, 929 F.2d 240, 243-245 (6th Cir. 1991) apply to bar Osborne's argument on this issue is incorrect.

The panel's decision overlooks Osborne's argument in his principal brief that on the merits the Hartford's denial was arbitrary and capricious. *Appellant's Final Brief* at 2 and 17 (stating "The Hartford's Denial Was Arbitrary and Capricious") and at 28-31.

Additionally, the panel's overlooks Osborne's supplemental citation of the recent Sixth Circuit opinion, *Kalish v. Liberty Mutual/Liberty Life Assurance Company of Boston*, 419 F.3d 501 (6th Cir. 2005), which offers substantial support to Osborne's appeal. Osborne stated in his supplemental citation (and argued on oral argument) that in light of this Court's opinion in *Kalish*, the Hartford's denial of benefits in Osborne's case was arbitrary and capricious. *See Letter of Supplemental Citation under FRAP 28(j).* (attached as Exhibit 3).

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unreasonable to determine that Osborne could perform sedentary work based on the evidence. *See Appellant's Final Brief* at 17, 23 n.4, 24 n.5, and 28. The panel's decision misstates Osborne's argument and issue for review on appeal. Thus, rehearing is proper.

Finally, the panel's opinion overlooks Osborne's argument that there is substantial evidence of Hartford's conflict of interest influencing its determination to deny benefits. *Appellant's Final Brief* at 26-27. Accordingly, a panel rehearing or a rehearing *en banc* is proper.

ARGUMENT

I. The Panel Incorrectly Interpreted The Term "Own Occupation".

As stated by Judge Cole in his dissent to the *Osborne Opinion*, the panel's decision conflicts with this Court's opinion in *Williams v. Int'l Paper Co.*, 227 F.3d 706 (6th Cir. 2000) which provides, "when interpreting ERISA plan provisions, general principles of contract law dictate that [courts] interpret the provisions according to their plain meaning in an ordinary and popular sense". Williams, 227 F.3d at 711; *See Perez v. Aetna Life Ins. Co.*, 150 F.3d 550, 556 (6th Cir. 1998). "In applying the 'plain meaning' analysis, we 'must give effect to the unambiguous terms of an ERISA plan.'" *Id.* (quoting *Lake v. Metropolitan Life Ins. Co.*, 73 F.3d 1372, 1379 (6th Cir. 1996)). Assuming that the term "own occupation" is unambiguous, then the term must be given its plain meaning.[2]

In this case, the term "own" used as an adjective in describing the term "occupation" in Osborne's ERISA plan

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[2] Compare below Osborne's argument to the contrary by assuming that the term "own occupation" is ambiguous. *Infra* at section IV. Common sense dictates that the term must be either ambiguous or unambiguous. In either case, the panel's decision fails to follow Sixth Circuit precedent.

(the "Policy") means "belonging to oneself or itself"; "used to specify an immediate or direct relationship." *Webster's Third New International Dictionary* 1612 (1986); *see also, Osborne Opinion,* J. Cole, dissenting at *6. Construing the Policy language according to its "plain meaning in an ordinary and popular sense" then, "own occupation" refers to Osborne's actual job duties. *Osborne Opinion,* J. Cole, dissenting at *6. Therefore, the Hartford's interpretation of the term "own occupation" utilizing the Dictionary to classify Osborne's occupation generically as it is performed in the national economy was unreasonable and contrary to this Court's opinion in *Williams*. Accordingly, the panel's opinion fails to follow 6th Circuit law on this issue.

II. The Panel Decision Renders The Term "Own" Surplusage By Reading It Out of the Policy Language.

The panel's decision further conflicts with this Court's opinion in *Union Inv. Co. v. Fid. & Deposit Co. of Md.*, 549 F.2d 1107, 1110 (6th Cir. 1977). Construing the Policy language to refer to the generic responsibilities on a national scale associated with Osborne's "occupation" renders the term "own" surplusage by reading it out of the Policy language. *Osborne Opinion,* J. Cole dissenting at *6. This Court held in *Union Inv. Co.* that "[a] contract will not be construed so as to reject any words as surplusage if they reasonably can be given meaning." *Union Inv. Co.*, 549 F.2d at 1110. The panel's opinion states that the difference between "own occupation" and "regular occupation" is relatively minor and, therefore, the reasoning of *Schmidlkofer v. Directory Distrib. Assocs., Inc.*, 107 Fed.Appx. 631 (6th

Cir. 2004) applies.[3] "Whatever the meaning of 'regular' is, it is not synonymous with 'own.'" *Osborne Opinion*, J. Cole, dissenting, at *6. Thus, the panel's opinion fails to follow 6th Circuit law on this issue because the panel's decision rejects the term "own."

III. The Panel's Decision Conflicts With The Arbitrary And Capricious Standard Of Review.

Further, the panel's decision conflicts with the arbitrary and capricious standard of review. *See, Calvert v. Firstar Finance, Inc.*, 409 F.3d 286, 292 (6th Cir. 2005). Under the arbitrary and capricious standard of review, the plan administrator's denial of disability benefits must be reasonable to be entitled to deference. *Id.* Assuming that the term "own occupation" is ambiguous or subject to more than one reasonable interpretation, Hartford has failed to offer a reasonable explanation based on the evidence for its decision to utilize the Dictionary when it had available a description of Osborne's occupational duties and when Osborne's actual job duties conflicted with those in the Dictionary. *See Osborne Opinion*, J. Cole, dissenting, at *7. Hartford even recognizes that the occupational duties are in conflict. *Id.* Additionally,

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[3] The panel's decision also overlooks the distinction between *Schmidlkofer* and this case. In *Schmidlkofer*, the administrator used the Dictionary definition of "Branch Manager" to define the claimant's occupation. In that case, the claimant was in fact a "Branch Manager." *See Appellant's Reply Brief* at 23 n.13. In this case, Osborne is not the President of a Financial Institution, but an insurance salesman. *See Appellant's Final Brief* at 17, 23 n.4, and 24 n.5. Hartford could have utilized the Dictionary definition of Sales Agent, Insurance which required light duty work (not sedentary) but failed to do so and has failed to offer a reasonable explanation for that failure. *See Appellant's Reply Brief* at 22-23.

Hartford has failed to offer a reasonable explanation for its decision to utilize the Dictionary to describe Osborne's occupation as President of a Financial Institution when Osborne is not the President of a Financial Institution, but an insurance salesman. *See supra* at 7 n.3. Thus, the panel's decision fails to correctly apply the arbitrary and capricious standard of review.

IV. The Panel's Decision Conflicts With 6th Circuit Law Of *Contra Proferentum*.

Moreover, the panel's opinion fails to follow 6th Circuit law of *contra proferentum* in interpreting ERISA plans. Ambiguous ERISA plan language should be construed against the drafter. *University Hosps. v. Emerson Elec. Co.*, 202 F.3d 839, 846-47 (6th Cir. 2000). The panel claims that this case does not involve the interpretation of the Policy language. The panel's opinion states, "The dispute before us is not over the meaning of 'own occupation,' . . . but over the methodology Hartford used to determine Osborne's occupation." *Osborne Opinion* at *4. Osborne respectfully disagrees.

The panel's opinion mistakenly creates a distinction between Hartford's methodology of determining Osborne's occupation and Hartford's interpretation of the Policy. The methodology Hartford used in determining Osborne's occupation (utilizing the Dictionary) *is in essence interpreting the Policy language*. The Hartford interpreted the term "own occupation" to mean Osborne's occupation as it is performed generically in the national economy. The method of interpretation Hartford utilizes is the Dictionary. Osborne contends that the utilization (which includes the methodology and the interpretation) of the Dictionary was arbitrary and capricious. *Appellant's Final Brief* at 2. The doctrine of

contra proferentum does apply in this matter. The term "own occupation" should be construed against the Hartford and should refer to Osborne's actual job duties as an insurance salesman.

V. The Panel's Decision Overlooks Multiple Arguments Made By Osborne.

A. The Panel's Decision Overlooks Osborne's Argument That He Is Not The President Of A Financial Institution And That Therefore The Hartford's Defining His Occupation As The President Of A Financial Institution Is Arbitrary and Capricious.

The panel's decision overlooks Osborne's argument in his opening brief and to the district court that he was not the President of a Financial Institution and that the Hartford's determining Osborne was the President of a Financial Institution was arbitrary and capricious. *See Appellant's Final Brief* at 17, 23 n.4, and 24 n.5; *Response and Supporting Memorandum of Law in Reply to the Hartford Life and Accident Insurance Company's Motion for Judgment on the Record* at 4, 11, 15, 16, and 24. Therefore, the panel's decision that *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 318 (6th Cir. 2005) and *Taft Broad. Co. v. United States*, 929 F.2d 240, 243-245 (6th Cir. 1991) apply to bar Osborne's argument on this issue is incorrect. Osborne raised this issue with the district court and in his opening brief (as well as oral argument).

Hartford even recognized this argument in Osborne's opening brief. *See Appellee's Brief* at 38 n.6. Hartford stated "although Osborne suggests that Hartford selected the wrong DOT classification by looking at 'President, Any Industry'

and 'President, Financial Institution,' he has failed to identify a better analog." *Id.* In reply, Osborne identified a better analog, specifically, "Sales Agent, Insurance." *Appellant's Reply Brief* at 22-23. The panel's decision incorrectly declines to consider this argument.

Additionally, on this issue, the panel's decision misunderstands that a factual record is not developed in the district court in an ERISA claim. The panel states that the failure to raise the issue of whether Osborne is a President of a Financial Institution in the district court resulted in a lack of a fully developed factual record on the point. *Osborne Opinion* at *4. However, the panel fails to recognize that 1) Osborne did indeed make the argument in the district court and 2) the factual record in an ERISA benefits claim at the district court level and the Court of Appeals is strictly limited to the administrative record (the record before the plan administrator when it denied the claim). *Moore v. LaFayette Life Ins. Co.*, 458 F.3d 416, 420 (6th 2006). Discovery is only permitted for procedural challenges, which is not applicable in this case. *Id.* Therefore, the reasoning of *Radvansky* and *Taft* do not apply here.

B. The Panel's Decision Overlooks Osborne's Argument That The Hartford's Denial On The Merits Was Arbitrary And Capricious.

The panel takes a narrow approach to the issues in Osborne's appeal. The issue is whether the Hartford's denial of Osborne's disability benefits was arbitrary and capricious. In Osborne's statement of issues for review, he stated this clearly yet Osborne also highlighted his strongest argument that the Hartford's utilization of the Dictionary to interpret the term "own occupation" was arbitrary and capricious. *Appellant's Final Brief* at 2.

Osborne argued in his principal brief that on the merits the Hartford's denial was arbitrary and capricious. Osborne argued that the evidence did not support the Hartford's denial. Osborne stated that "[t]he substantial evidence does not support Hartford's denial of Mr. Osborne's claim." *Appellant's Brief* at 28. "Therefore, the Hartford's denial of benefits was arbitrary and capricious, and the district court's holding should be reversed." *Appellant's Brief* at 31. In his reply brief, Osborne stated additional reasons that the Court should reverse the Hartford's denial, and Osborne did not raise this issue for the first time in his reply brief.

Osborne also raised this issue with the District Court. *See Response and Supporting Memorandum of Law in Reply to the Hartford Life and Accident Insurance Company's Motion for Judgment on the Record* at 5, 16-24. Accordingly, the panel's decision overlooks this argument and panel rehearing is proper.

C. The Panel Overlooks Osborne's Supplemental Citation.

Additionally, the panel overlooked Osborne's supplemental citation of the recent Sixth Circuit opinion, *Kalish v. Liberty Mutual/Liberty Life Assurance Company of Boston*, 419 F.3d 501 (6th Cir. 2005), which offers substantial support to Osborne's appeal. Osborne stated in his supplemental citation (and argued on oral argument) that in light of this Court's opinion in *Kalish*, the Hartford's denial of benefits in Osborne's case was arbitrary and capricious. *See Letter of Supplemental Citation under FRAP 28(j).*

Kalish held that the administrator's denial of benefits was arbitrary and capricious and considered multiple factors also applicable in Osborne's appeal. Most importantly, the Court

held, "the fact that [plaintiff] might be capable of sedentary work cannot be a rational basis for finding that he was not disabled" when the plan "explicitly stated that a participant is disabled so long as 'he is unable to perform *all* of the material and substantial duties of *his* occupation,'" and given that his actual job "required him to walk, stand, and reach for several hours a day.". *Id.* at 506-507 (*emphasis in original*). Similarly, the Hartford's failure to consider Osborne's actual job duties under a "his own occupation" policy is also arbitrary and capricious. Among others, Osborne's standing and walking requirements, stressful activities, and long hours are not addressed by Hartford in the administrative record or in its physician's findings. *See Exhibit 3.* Osborne respectfully requests a panel rehearing.

VII. The Panel's Opinion Overlooks Osborne's Argument That There Exists Substantial Evidence That Hartford's Conflict Of Interest Influenced Its Decision To Deny Osborne Benefits.

The panel's opinion overlooks Osborne's argument regarding the substantial evidence of Hartford's conflict of interest influencing its determination to deny benefits. Osborne raised this issue in his opening brief and with the district court. *Appellant's Final Brief* at 26-27. Hartford then responded that it was not influenced by its conflict of interest. Osborne then raised additional examples of Hartford's influence in its reply brief that this Court in *Calvert* deems factors a court must consider as examples of an ERISA plan administrator's influence by its conflict of interest. Accordingly, panel rehearing is proper.

CONCLUSION

For the foregoing reasons, Osborne respectfully requests a panel rehearing and suggests a rehearing *en banc* of the judgment and opinion of the panel entered in this case on October 3, 2006.

Respectfully submitted,

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By: /s/_____
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Attorneys for Appellant,
Bruce Osborne

CERTIFICATE OF SERVICE

On this date, I provided a copy of foregoing Petition of Plaintiff-Appellant to the following via first-class U.S. mail:

David A. Thornton
The Tower at Peabody Place
100 Peabody Place, Suite 900
Memphis, TN 38103-3672

I declare that the statements above are true to the best of my information, knowledge and belief.

/s/_____
Don L. Hearn, Jr.

Dated: October 16, 2006

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

[Filed October 1, 2004]

BRUCE OSBORNE,
Plaintiff,

v. No. 02-2140 DV

HARTFORD LIFE AND
ACCIDENT INSURANCE
COMPANY,
Defendant.

RESPONSE AND SUPPORTING MEMORANDUM OF LAW IN REPLY TO THE HARTFORD LIFE AND ACCIDENT INSURANCE COMPANY'S MOTION FOR JUDGMENT ON THE RECORD

The Plaintiff, Bruce Osborne ("Mr. Osborne"), by and through his counsel files this Memorandum of Law in Reply to the Defendant, Hartford Life and Accident Insurance Company's ("Hartford") Memorandum in Support of its Motion for Judgment on the Record and shows the Court the following:

INTRODUCTION

The Plaintiff, Bruce Osborne ("Mr. Osborne") filed this action to recover long term disability benefits under a group insurance policy, The Hartford Life Accident Insurance Policy No. GLT033342 (the "Policy"). The Hartford issued the Policy to TPI Restaurants, Inc. Mr. Osborne was covered under the Policy by virtue of his employment with Insurex Agency, Inc. and Insurex Benefits Administrators, Inc. (collectively "Insurex"), subsidiaries of TPI Restaurants, Inc.

Mr. Osborne was the President of Insurex from June 1989 until May 1996, when he was diagnosed with congestive heart failure and ceased working. Insurex is an insurance agency and third-party administrator that sells various insurance coverage and/or third-party administrative services to employers. Mr. Osborne's duties as President required him to travel extensively and promote himself and Insurex directly to potential and existing clients as well as insureds that e represented. In May 1996, Mr. Osborne applied for long-term disability benefits under the Policy. Under the Policy, Mr. Osborne is entitled to long-term disability benefits if he is Totally Disabled.

Shortly after May 1996, the Hartford determined that Mr. Osborne was totally disabled and began paying him long-term disability benefits. On March 1, 2001, the Hartford effectively terminated Mr. Osborne's long-term disability benefits. Mr. Osborne filed suit seeking reversal of the Hartford's decision and an award of all benefits he is entitled.

LAW AND ANALYSIS

I. In Reviewing the Hartford's Denial, the Sixth Circuit Requires Consideration of Hartford's Conflict of Interest

This case involves a claim for total disability benefits under an ERISA-governed employee benefit plan. In assessing a benefits determination under ERISA, courts must first decide which of ERISA's two standards of review applies, arbitrary and capricious or de novo. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989). Under *Firestone*, courts only utilize an arbitrary and capricious standard of review if the benefit plan gives the plan administrator discretionary authority to determine eligibility for benefits or to construe terms of the plan. *Id.*; *Wilkins v. Baptist Healthcare System, Inc.*, 150 F.3d 609, 613 (1998). In this case, both parties agree that the benefit plan gives the Hartford discretionary authority to determine eligibility for benefits or to construe terms of the plan. Thus, the arbitrary and capricious standard of review applies.

Under this deferential "arbitrary and capricious" standard, a benefit determination will be upheld so long as it is "rational in light of the plan's provisions." *Yeager v. Reliance Standard Life Ins. Co.*, 88 F.3d 376, 381 (6th Cir. 1996). If it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary or capricious. *University Hospitals of Cleveland v. Emerson Electric Co.*, 202 F.3d 839, 846 (6th Cir. 2000). However, this deferential review of a benefit denial is tempered by the following two principles: 1) *potential conflicts of interest must be taken into account*; and 2) *plan language susceptible to more than one interpretation is*

construed against the plan administrator. Id. at 846-47 (*emphasis added*).

In this case, the court reviews the decision of the Hartford taking into account its conflict of interest. A conflict of interest exists where the plan administrator is appointed and/or controlled by the entity funding the plan or where the plan administrator and the insurer that ultimately pays the benefits are the same entity. *Id.* at 846; *Darland v. Fortis Benefits Ins. Co.*, 317 F.3d 516, 527-28 (6th Cir. 2003) (noting that "'there is an actual, readily apparent conflict not a mere potential for one' when the insurance company/plan administrator is the insurer that ultimately pays the benefits."); *Killian v. Healthsource Provident Adm'rs, Inc.*, 152 F.3d 514, 521 (6th Cir. 1998). If the plan administrator is operating under a conflict of interest, this conflict is a factor in determining whether "the decision to deny benefits was arbitrary and capricious." *Darland*, 317 F.3d at 527; see *also, Firestone Tire & Rubber Co.*, 489 U.S. at 115, 109 S.Ct. 948. In this case, Hartford is both the plan administrator deciding eligibility and the insurance company ultimately responsible for paying the claim, therefore, there is "an actual, readily apparent conflict" the court will consider in the course of reviewing Hartford's benefits determination. *Darland*, 317 F.3d at 527-28; *Killian*, 152 F.3d at 521.

II. The Hartford's Denial of Benefits Based Upon Its Interpretation of the Policy and the Evidence Was Arbitrary and Capricious

The Hartford's reversal of its original decision after five (5) years was asserted to be because Mr. Osborne's condition allowed him to perform sedentary work. This was the result of the Hartford's determination that Mr. Osborne could

perform sedentary work. Hartford applied the wrong standard by utilizing the Department of Labor Dictionary of Occupational Titles' (the "DOT") definition for "President, Financial Institution" to describe Mr. Osborne's occupation as one that was "sedentary." They determined that because being a President of a company was considered a sedentary occupation, Mr. Osborne could not be disabled. Aside from totally ignoring the terms of the policy,[1] Osborne was President of Insurex when he was originally determined to disabled and there was no consideration of his job as president as a sedentary occupation, but rather it was determined that he could not perform his specific job. It was unreasonable to classify Mr. Osborne's job as sedentary because 1) the Policy specifically provides that the Hartford was to consider Mr. Osborne's "own occupation," 2) Mr. Osborne's employer provided the Hartford with Mr. Osborne's job description and the physical requirements of his job, which is not sedentary and, 3) Mr. Osborne is not a president of a financial institution.

Further, the evidence does not support the Hartford's denial. Mr. Osborne, his employer, and his treating physician of over 6 years determined that Mr. Osborne could not perform the material and substantial duties of his own occupation. The only evidence to the contrary was 1) the characterization of Mr. Osborne's occupation as sedentary, 2) Dr. Vita's determination that Mr. Osborne could perform

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[1] The Policy defines Totally Disabled as:

> Totally Disabled means you are prevented by disability from doing all the material and substantial duties of your *own occupation* on a full time basis.

(*A.R. HFD 22*)

sedentary work, and 3) documentation of his activity level in the file and on surveillance tape.

In *Cunningham v. The Paul Revere Life Ins. Co.*, 235 F. Supp.2d 746 (W.D. Mich. 2002), the plaintiff was insured under an employer sponsored benefit plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* The plaintiff's group disability policy was administered by the defendant Paul Revere Life Insurance Company ("Paul Revere"). *Cunningham*, 235 F.Supp.2d at 748. The plaintiff developed a heart condition, specifically severe dilated cardiomyopathy. *Id.* at 749. According to the plaintiff's treating physicians, the plaintiff was totally disabled and unable to work for any reason and at any level. *Id.* at 749. The plaintiff applied for disability income benefits under the group policy and his claim was approved in May 1999.[2] *Id.* Two years later, however, Paul Revere, denied plaintiff's claim for continued benefits. *Id.*

The Court reviewed the insurer's denial under the arbitrary and capricious standard of review because the disability policy clearly granted the arbitrator discretionary authority to determine coverage and benefits under the policy. *Id.* Also, the insurer both funded and administered the plan, therefore, it had an actual conflict of interest. *Id.* Accordingly, the court was "required to take the conflict into account as a factor in determining whether the decision was motivated by self-interest or otherwise was arbitrary and capricious." *Id.* (*citing Peruzzi v. Summa Medical Plan*, 137 F.3d 431, 433 (6th Cir. 1998)).

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[2] The Social Security Administration also determined that plaintiff was disabled in March of 1999. *Id.*

The policy in *Cunningham* provided:

> Total disability or totally disabled from the employee's own occupation means that until he reaches the end of his maximum benefit period, the employee:
>
> (1) is unable to perform the important duties of **his own occupation** on a full-time or part-time basis because of injury or sickness that started while insured under this policy;
> (2) does not work at all; and
> (3) is under doctor's care.

Id. at 751 (*emphasis added*). The issue for the Court was whether the plaintiff was unable to perform the important duties of his own occupation on a full-time or part-time basis. *Id.* at 751-752.

The Court held that Paul Revere's denial of plaintiff's claim for continued disability benefits was arbitrary and capricious because their denial was not a reasonable interpretation of the plan and the denial was not based on the evidence. *Id.* at 755. Plaintiff, his treating physicians, his employer, and his vocational expert all determined that he was unable to meet the demands of his *own occupation*. The only evidence Paul Revere relied upon to rebut that determination was 1) the characterization of plaintiff's occupation as sedentary via the DOT, 2) evidence of plaintiff's clinically stable course, and 3) documentation of his activity level in the file and on surveillance tape. *Id.* at 755. The Court first noted that the characterization of plaintiff's occupation as sedentary was not a reflection of plaintiff's occupation as evidenced in the file. The plaintiff had described his occupation as involving five (5) hours of sitting as well as five (5) hours of standing and walking everyday.

The record also reflected that a third of the plaintiff's job involved international travel, and that some lifting is necessarily required to accommodate the ability to travel and to meet with clients, customers, and vendors. There was no evidence to the contrary. *Id.* at 755.

A vocational consultant for Paul Revere conducted an "own occupation" occupational analysis of plaintiff's position as Vice President of Sales and Marketing for his employer. She concluded that:

> [T]he occupation of Vice President is considered to be performed in the sedentary exceptional level in the national economy as per the Dictionary of Occupational Title's (DOT) definition approved by the Department of Labor. Therefore, the claimant does not appear to be precluded from his occupation as performed in the national economy.

Id. at 752. However, the vocational consultant provided the following clarification of sedentary work:

> The prior occupational analysis identifying the insured's occupation as VP of Sales is accurate, but I can clarify one aspect of the vocational review. The exertional level of sedentary means that the occupation is typically performed while seated. *This does not mean that the pace and demands of the occupation are slow or easy. For example, this occupation typically involves extensive traveling--in today's economy more than ever. This can be hectic and fast-paced, but still sedentary. Also, sedentary occupations can involve up to 2 hours a day of standing and walking. This would encompass traveling demands. Sedentary occupations can be demanding and pressured, as this one is due to*

> *the level of responsibility, the variety of demands, and the need for extensive travel.*

Cunningham, 235 F.Supp.2d at 754 (*emphasis added*). The court found that his occupation was not a sedentary occupation based upon the plaintiff's actual job duties and, thus, that it was unreasonable to consider the DOT to classify his occupation under an "own occupation" policy. Further, the court noted that, even under the vocational consultant's assessment, the plaintiff's occupation was not sedentary.

Paul Revere's medical doctor found that the plaintiff was able to perform a sedentary occupation. However, this was an improper analysis as the court determined that his occupation was not sedentary. Paul Revere's doctor made no analysis of whether the plaintiff had the physical capacity to perform the actual duties of his specific employment—standing and walking five hours a day, day after day, or traveling to boat shows and vendors.[3] The doctor indicated that he based his finding that plaintiff was not disabled on plaintiff's clinical stability and documentation of his activity level. *Id.* at 755.

With respect to the plaintiff's clinical stability, the court stated:

> In focusing on plaintiff's clinical stability, [Paul Revere's doctor] completely ignored the fact that plaintiff only became clinical stable when he was away from the stresses of his occupation. On August 16,

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[3] In fact, the evidence repeatedly reflected that plaintiff easily fatigued and that it took him days to recover from his over-exerts. *Cunningham*, 235 F.Supp.2d at 755.

> 1999, [plaintiff's treating physician] reported that plaintiff 'looks remarkably good' and 'continues to feel better,' and that 'most of this has been an improvement because of his disability status and stopping from work.' [Plaintiff's treating physician's] notes from April 25, 2000, reflect that the plaintiff has been feeling better since being placed on disability and away from work. On May 31, 2001, [plaintiff's treating physician] again noted 'that plaintiff had significant improvement once he stopped working.' [Paul Revere's doctor's] focus on plaintiff's clinical stability also ignores [plaintiff's treating physician's] explanation that when he said plaintiff was 'doing well' it was in the context of someone in plaintiff's medical condition.

Id. at 756. Thus, the court found that Paul Revere's doctor's failure to consider the plaintiff's actual job duties and his misplaced reliance upon the treating doctor's positive reports was unreasonable.

Further, Paul Revere's investigative report indicated that plaintiff was under surveillance in April of 2001. Plaintiff was observed driving his car on several occasions, walking from his car to a business, and walking in his backyard, but most of the time in the house where his activities could not determined. *The court noted that this scant evidence provided no reasonable basis for ignoring the objective indicators showing the continual deterioration of the strength in plaintiff's severely compromised heart function. Id.* at 756 (*emphasis added*).

In conclusion, the court stated that Paul Revere had simply determined that the plaintiff could sit at a desk. Paul Revere did not determine if the plaintiff could perform his

actual duties of his employment, which were in fact not sedentary. Paul Revere ignored the overall effect plaintiff's occupation might have on his cardiovascular health. The policy required the defendant to consider plaintiff's ability to perform "his own occupation," therefore, it was an abuse of discretion for defendant to deny disability benefits without the considering the plaintiff's actual job duties, stresses associated with plaintiff's occupation, and its effects on plaintiff's cardiovascular health. *Id.* at 757.

Cunningham relied upon a similar case, *Shipp v. Provident Life & Acc. Ins. Co.*, 214 F.Supp.2d 1241 (M.D. Ala. 2002). In *Shipp*, the insurer abruptly cut off disability benefits under an "own occupation" policy to an individual with a serious heart condition and a stressful occupation. The following analysis from *Shipp* was applied to *Cunningham*:

> Although [plaintiff's treating physician] warned that stress and near-constant travel would further endanger [plaintiff's] health, [the insurer's] clinical reviewers only looked at [plaintiff's] ability to work from the perspective of physical requirements--as if [plaintiff's] ability to work could be judged solely with respect to the degree of manual labor he might be required to perform. Can [plaintiff] sit at a desk on a full-time basis? Probably. [Plaintiff's treating physician's] conclusion that [plaintiff] was disabled, however, took into account the overall effect that [plaintiff's] occupation was likely to have on his already precarious situation.

Id. at 1249; *see also, Marchetti v. Sun Life Ins. Co. of Canada*, 30 F.Supp.2d 1001 (M.D. Tenn. 1998) (holding that insurer "erroneously discounted the opinions of plaintiff's treating physicians in favor of the opinion of an alleged

'independent' examiner, who saw plaintiff only once and could not confirm or refute the treating physician's findings; also holding it was arbitrary and capricious to discount plaintiffs actual job duties).

Similarly, the Southern District of Florida analyzed whether the use of the DOT was proper to classify an insured's "regular occupation" under a disability policy. In *Freling*, the insurer of an employee disability policy attempted to construe the term "regular occupation" in the policy as incorporating a "national standard." *Freling*, 315 F.Supp.2d at 1288. In denying the plaintiff's claim for disability benefits, the insurer relied upon the DOT to define plaintiff's "regular occupation" in the national economy. The court held that the insurer's definition was not reasonable and held that "regular" occupation should be construed "as particularly referring to [the plaintiff's specific duties] or what [the plaintiff] did on a daily basis in his occupation. *Id.* at 1288–89. The court cited with approval *Ebert v. Reliance Standard Life Ins. Co.*, 171 F.Supp.2d 726, 735 (S.D. Ohio 2001), in which the court stated:

> The policy does not define the duties of an insured's regular occupation to mean the duties of a 'similar' DOT-specified occupation. Defendant is not is [sic] a position where it must determine Plaintiff's regular job duties in the absence of an actual job description. The [employer] provided a job description as well as a supplemental job description at the request of Defendant that further described the duties required while at work [for the employer] . . . . There is no reason to assume that a national standard set forth in the DOT defines the duties of Plaintiff's regular occupation.

Id. Thus, the court held that the insurer's interpretation that "regular occupation" incorporates a "national standard" was unreasonable. The *Freling* court also stated:

> In summary, it was unreasonable for [the insurer] to automatically turn to the DOT and assume that each listed task was a material duty of its insured's regular occupation. To the extent that Defendant used the DOT because it defines occupations in the national economy, the resulting expansive construction of the term 'occupation' is not supported by the Policy language. Had [the insurer] wanted to do so, it could have incorporated the DOT classifications into the Policy language to give meaning to the Policy's terms. Moreover, [plaintiff] and his employer supplied Defendant with evidence of the material duties of Plaintiff's regular occupation, evidence that was not addressed by Defendant. . . . Defendant's denial of benefits based on its Policy interpretation was arbitrary and capricious.

Freling, 315 F.Supp.2d at 1294; *see also, Lasser v. Reliance Standard Life Ins. Co.*, 344 F.3d 381 (3rd Cir. 2003) (plain meaning of undefined term "regular occupation" was usual work that insured was actually performing immediately before onset of disability); *Pinto v. Massanari*, 249 F.3d 840 (9th Cir.2001) (DOT definition was "generic" and did not adequately capture "varying abilities and job knowledge" required of persons with a specific job description).

Like the above cases, the Hartford's interpretation of the policy was unreasonable. It was arbitrary and capricious to define Mr. Osborne's occupation as sedentary based upon the DOT and fail to consider Mr. Osborne's actual job duties, because 1) the policy specifically provided that Hartford was

to consider Mr. Osborne's "own occupation, 2) the Hartford was supplied with Mr. Osborne's actual job duties and a description, and 3) Mr. Osborne is not a president of a financial institution. Like in *Freling* and *Ebert,*, "[t]here is no reason to assume that a national standard set forth in the DOT defines the duties of plaintiff's regular occupation"—or in this case, Mr. Osborne's "own occupation." *Id.* at 735. In the Hartford's Denial Letter of March 26, 2001 clearly provides that the Hartford classified Mr. Osborne's job as sedentary based on a the DOT, not Mr. Osborne's "own occupation." The above cases hold that interpreting an insured's "regular occupation" as incorporating the national economy is unreasonable. It rationally follows that the court should give a narrower interpretation to the term "own occupation." Therefore, the Hartford should have determined coverage based upon what Mr. Osborne did on a daily basis. Instead, Hartford relied on the DOT. Such reasoning is arbitrary and capricious.

The Hartford stated:

> A vocational assessment of Mr. Osborne's occupation as a "President, Financial Institution" classified his occupation under the "Sedentary" classification. This information is according to the Department of Labor occupational requirements under D.O.T. Code 186.117-054.
>
> Our conclusion based on his occupational classification as being sedentary, and our medical and observation assessment, is that Mr. Osborne is no longer disabled from his own occupation as a President of Financial Institution, and therefore, his claims for LTD and PW have been terminated effective 03/01/01.

(*A.R. HFD 75*). Further, the Hartford's letter to John Houseal dated April 18, 2001 corroborates that the Hartford did not consider Mr. Osborne's specific job duties when denying his claim. It provides:

> Our "Vocational assessment" of Mr. Osborne's occupation as a "President of a Financial Institution," has classified this occupation as "Sedentary." This was based on how the occupation is performed in the national economy as classified by the Department of Labor, and is not an individual's job specific assessment.
>
> *Although Mr. Osborne's specific job in the occupation of a "President of a Financial Institution" may have involved traveling, the occupational requirements per the DOT Code, does not require traveling.* [4]

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[4] In the Hartford's Brief, it asserts that the appeals examination by Dr. Vita conducted in August 2001 considered the actual job duties of Mr. Osborne. However, this is not consistent with his report and this is obviously an attempt to ratify their previous position. Dr. Vita states in his report that he was asked specifically to determine if Mr. Osborne could perform a sedentary occupation. (*A.R. H.F.D. 84*). Nowhere in Dr. Vita's report does he address Mr. Osborne's actual job requirement of standing and walking 34% to 66% of the time. (*A.R. HFD 568*). The report states, "There is little doubt that the functional capacity displayed in the surveillance video and report would permit the claimant to do *the sedentary work required to perform his previous job*, including traveling every other month." Mr. Osborne's job was not sedentary. Like in *Cunningham*, it was arbitrary for Dr. Vita to base his medical opinion on this classification of Mr. Osborne's job. The proper analysis is to determine if Mr. Osborne could perform his actual job duties. Neither the Hartford, nor Dr. Vita performed such an analysis. Plus, it is undisputed that Mr. Osborne's actual job was

(*A.R. HFD 119*) (*emphasis added*).

Following the reasoning in *Freling* and *Cunningham*, it is unreasonable to utilize the DOT to classify Mr. Osborne's occupation, because "own occupation" set forth in the Policy plainly refers to Mr. Osborne's actual duties and what he did on a daily basis. The policy provides:

> You will be paid benefits if you: (1) become Totally Disabled while insured under this plan; (2) remain Totally Disabled throughout the Elimination Period; (3) remain Disabled beyond the Elimination Period; and (4) submit Proof of Loss satisfactory to the Hartford.

(*A.R. HFD 22*) The Policy defines Totally Disabled as:

> Totally Disabled means you are prevented by disability from doing all the material and substantial duties of your *own occupation* on a full time basis.[5]

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extremely stressful and demanding. (*A.R. HFD 558*).

[5] This language is provided by an endorsement to the Policy that became effective January 1, 1992. Thus, it is the applicable language with respect to Mr. Osborne's benefits. The original policy provided:

> Totally Disabled means that:
> (a) during the Elimination Period; and
> (b) for the next 24 months,
> you are prevented by Disability from doing all the material and substantial duties of your own occupation on a full time basis. After that, and for as long as you remain Totally Disabled, *you are prevented by Disability from doing any occupation or work*

(*A.R. HFD 2*, (*emphasis added*). In this case, the Policy does not define the term "own occupation." Therefore, it should be afforded its plain and ordinary meaning—Mr. Osborne's actual job as performed by him.[6]

Further, Insurex supplied the Hartford with a description of Mr. Osborne's occupation, therefore, as the court noted in *Freling*, it was completely unreasonable to utilize the DOT to classify his occupation. The description provided:

> Responsible for the sales and marketing of new clients that entails ***extensive traveling***. Negotiation with insurance companies on quotes for proposals and renewal rates. Providing customer service and assistance to the existing clients. Meeting with brokers to discuss prospective clients and existing clients. Oversee the internal functions of the

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> *for which you are or could become qualified by training, education, or experience.*

(*A.R. HFD 26*). The language of the policy prior to the endorsement plainly distinguishes between "own occupation" and any occupation Mr. Osborne could perform. The omission of the latter language from the present policy supports the interpretation that "own occupation" refers to Mr. Osborne's specific duties as President of Insurex.

[6] Although Plaintiff contends that the term "own occupation" is not ambiguous, if the court determines that it is ambiguous, it is to be construed strictly against the Hartford. *University Hospitals*, 202 F.3d at 846. Thus, the court should define "own occupation" as what Mr. Osborne did on a daily basis as opposed to utilizing a DOT definition. *Freling*, 315 F.Supp.2d at 1288

> company, staff and production issues. Consultant and Member of QUBIC - Employee Benefits Management Consortium.
>
> *Prior to 1994 I traveled approximately two weeks out of the month to meet with existing clients, prospective clients and consultant/brokers. In the last year, I have curtailed traveling to approximately one week every other month.* [7]

(*A.R. HFD 574*). This clearly is not a sedentary occupation. Moreover, in the Employer's Statement in Mr. Osborne's Application for Long Term Disability Benefits, it provided that Mr. Osborne's job duties consisted of **standing frequently—34% to 66% of the time and walking frequently—34% to 66% of the time**. (*A.R. HFD 568*). On an average 10-hour workday, this amounts to 3 to 6 hours of standing and walking per day. This clearly is not sedentary and it was arbitrary and capricious for the Hartford to disregard this information and conclude via the DOT that Mr. Osborne's job was sedentary.[8]

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[7] The Hartford attempts to challenge Mr. Osborne's job description on the basis that it was written by Mr. Osborne himself. However, the description was clearly approved by his employer as it was his employer who submitted the description by attaching it to his application for long term disability benefits. (*A.R. HFD 568*).

[8] As noted in *Cunningham*, sedentary:

> does not mean that the pace and demands of the occupation are slow or easy. For example, this occupation typically involves extensive traveling--in today's economy more than ever. This can be hectic and fast-paced, but still sedentary. Also, sedentary occupations can involve up to 2 hours a

Additionally, The Hartford disregarded the employer's statements that Mr. Osborne could not perform the material and substantial duties of his job. Mr. Osborne's employer stated that his job could *not* be performed by alternating sitting and standing. *(A.R. HFD 568)*. Further, notably omitted from the Hartford's brief, was the employer's statement that Mr. Osborne's job could not be modified to accommodate the disability either temporarily or permanently. *(A.R. HFD 568)*. When asked the question, "[i]s it possible to offer the employee assistance in doing the job (e.g., through the use of technology or personal assistance)," Insurex responded in the negative.

The Hartford presented no evidence to the contrary regarding Mr. Osborne's actual job duties. The DOT utilized by the Hartford provides:

> **Physical Requirements**
>
> **Strength:** Sedentary Work
> Lifting, Carrying, Pushing, Pulling 10 Lbs. occasionally.
> Mostly sitting, may involve standing or walking for brief periods of time.

(A.R. HFD 126). Another DOT form provides:

> day of standing and walking. This would encompass traveling demands. Sedentary occupations can be demanding and pressured, as this one is due to the level of responsibility, the variety of demands, and the need for extensive travel.

Cunningham, 235 F.Supp.2d at 754 (*emphasis added*).

Physical Demands of the Job
Use the following scale to rate frequency of occurrence for each variable.
N=Never
F=Frequently (2.5-5.5 Hrs/Day)
O=Occasionally (0-2.5Hrs/Day)
C=Constantly (5.5+Hrs/Day)

Strength: Sedentary Work: Standing, Walking, Sitting, Controls, Pulling, Lifting, Carrying, Pushing è Up to 10 Lbs. occasionally, neglible amount frequently.

(*A.R. HFD 132-33*). Clearly, both of these standards are at odds with Mr. Osborne's employer's conclusion that Mr. Osborne must perform walking and standing 34% to 66% of the time.

Further, Mr. Osborne is not a President of a Financial Institution. The description provides:

> Plans develops, and directs financial policies and practices of bank, savings bank, commercial bank, trust company, mortgage company, credit union, or company dealing in consumer credit, such as a finance company, to ensure that financial objectives, goals, and institutional growth are met and in accordance with policies of Board of Directors or corporate charter and government regulations.[9]

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[9] The Hartford attempts to ratify its position by inserting the DOT definition of "President, Any Industry." However, this classification was only mentioned in one letter by the Hartford. (*A.R. HFD 119*). Further, as a matter of law, under *Freling* and *Cunningham*, it is arbitrary and capricious to classify Mr. Osborne's job and describe his duties with the DOT when the

(*A.R. HFD 123*). However, Mr. Osborne is not a president of a financial institution. He is the president of an insurance agency. His job duties are: "Responsible for the sales and marketing of new clients that entails ***extensive traveling***. Negotiation with insurance companies on quotes for proposals and renewal rates. Providing customer service and assistance to the existing clients. Meeting with brokers to discuss prospective clients and existing clients. Oversee the internal functions of the company, staff and production issues." These duties do not involve running a financial institution.

It is clear that the Hartford's conflict of interest was an integral part of its use of the DOT to classify Mr. Osborne's occupation as sedentary. 1) The policy specifically provided that Hartford was to consider Mr. Osborne's "own occupation, 2) the Hartford was supplied with Mr. Osborne's actual job duties and a description, and 3) Mr. Osborne is not a president of a financial institution. In light of Hartford's actions and its conflict of interest, this Court must conclude that the Hartford was arbitrary and capricious in classifying Mr. Osborne's job as sedentary via the DOT.

The evidence does not support Hartford's denial of Mr. Osborne's claim. Mr. Osborne, his employer, and his treating physician of over 6 years determined that Mr. Osborne could not perform the material and substantial duties of his own occupation.[10] The only evidence to the contrary

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Policy clearly referred to his "own occupation and Insurex provided the Hartford with a description of Mr. Osborne's actual job duties.

[10] On July 1, 1998, the Social Security Administration determined that Mr. Osborne had a disability and was entitled to benefits under the Social Security Act and was entitled to benefits beginning on May 28, 1996. (*A.R. HFD 497*). The Administrative Law Judge

was 1) the characterization of Mr. Osborne's occupation as sedentary, 2) Dr. Vita's evaluation that determined Mr. Osborne could perform sedentary work, and 3) the surveillance. Like the insurer in *Cunningham,* the Hartford arbitrarily and capriciously denied his claim based upon the evidence.

It is arbitrary and capricious to disregard the opinion of Mr. Osborne's treating physician. Dr. Kevin Newman, ("Dr. Newman"), Mr. Osborne's treating physician for over 6 years

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found:

1. The claimant met the insured status requirements of the Act on May 28, 1996, and has not performed any substantial gainful activity since that date.
2. The claimant's impairment which is considered to be "severe" under the Social Security Act is congestive heart failure.
3. The claimant's impairment is attended with the same signs and findings as those published in 20 CFR Part 404, Appendix 1 to subpart P (Listing 4.02A of Impairments).
4. The claimant has been under a disability since May 28, 1996.

(*A.R. HFD 497*). Although not binding on this court, this finding is certainly persuasive evidence of Mr. Osborne's disability. *See Napier v. Hartford Life Insurance*, 282 F.Supp.2d 531, 539 (E.D. Kent. 2003) ("[A] Social Security Administration's disability determination is not binding on an ERISA plan administrator, however, this Court will consider that Administration's determination of disability with respect to [the plaintiff] as a factor in determining whether Hartford made the appropriate decision regarding termination of Napier's benefits in this *de novo* review.") (*citing Darland v. Fortis Benefits Ins. Co.*, 317 F.3d 516,529 (6th Cir. 2003)).

repeatedly stressed that Mr. Osborne could not participate in any type of work, even the most sedentary. On August 6, 1996, Dr. Newman, wrote a letter to the Hartford concerning Mr. Osborne's medical condition. It provides:

> I have been asked by Mr. Osborne to fax information concerning his medical condition, which I have already done on a number of occasions.
>
> Once again, in summary, he has signs and symptoms of congestive heart failure with easy fatigability and dyspnea with minimal exertion. He had an echocardiogram performed on May 6, 1996, which indicates an ejection fraction estimated to be 33 percent. The interpretation of this is as follows: "Global left ventricular systolic function is moderately to severely impaired." He has mainly been bothered by easy fatigability and an increased heart rate with minimal exertion.
>
> His medications had been enalapril 10 mg p.o. b.i.d. and Lanoxin 0.25 mg p.o. b.i.d. he was admitted to the University of Tennessee Medical Center on May 28, 1996, for institution of experimental therapy under a research protocol. He has been enrolled in the study of the beta blocker medication known as cardevilol. The dosage has been titrated up since he initially began this medication on May 28, 1996. I cannot tell any appreciable change in his symptoms. He currently takes cardevilol 50 mg p.o. b.i.d. in addition to the aforementioned dosage of enalapril.
>
> *In my opinion, Mr. Osborne cannot do the material duties of his job.* Furthermore, it should be noted that he has had great concern about his inability to receive

> his disability insurance. This has resulted in significant insomnia, some degree of anxiety, and possibly a mild depression. In my opinion, these stressful factors could exacerbate his cardiac condition.

(*A.R. HFD 563-64*) (*emphasis added*).

On August 15, 1996, a consultant for Hartford, Marie S. Smallwood, BSN, concurred with Dr. Newman that Mr. Osborne was functionally impaired for his current occupation as company President. (*A.R. HFD 560*). Mrs. Smallwood stated:

> Primary clinical manifestations of dilated cardiomyopathy are dyspnea on exertion and easy fatigability. The prognosis for patients with this type of cardiomyopathy is poor with 70% of patients dying in [less than] 5 years, 50% are sudden. Appropriate rest, sleep, and stress avoidance is imperative. Physical activities are not possible due to effort dyspnea. Based on objective clinical documentation, i.e., gradually decreasing LVEF, ongoing subjective report of easy fatigability despite medication adjustments, I concur with AP (Dr. Newman) that this gentlemen is functionally impaired for his current occupation of company President.

(*A.R. HFD 560*).

On August 29, 1996, the Hartford formally approved Mr. Osborne's claims for long term disability benefits. (*A.R. 545*). The original claim approval notes, dated August 16, 1996, provide as follows:

> ***Given the fact that the insured is a president, his occupational duties would encompass a great deal of stress.*** The insured's cardiologist, Dr. Newman, has indicated the insured is [Totally Disabled per his own occupation and all occupations]. Clinical evidence supports the claimant's asserted disabling condition and inability to perform the material and substantial duties of his own [occupation] given the chronic and severe nature of his disability.

(*A.R. HFD 558*). Thus, the Hartford originally determined that Mr. Osborne was disabled with respect to his specific duties as president of Insurex. The Hartford's determination five (5) years later that Mr. Osborne's occupation was sedentary based on the DOT was arbitrary and capricious and indicative of their conflict of interest and bad faith.

Dr. Newman placed physical limitations on Mr. Osborne's activity as: Standing-no more than 2 hours at a time; Walking- no more than 30 minutes at a time; Lifting/Carrying-no more than 20lbs. (*A.R. H.F.D. 74*). Insurex's statement that Mr. Osborne's duties consisted of standing and walking 34% to 64% of the time is beyond the doctor's limitations. However, the Hartford arbitrarily relied upon the DOT to define Mr. Osborne's duties of his job. Further, in the investigative report by Fred Diggle, Mr. Osborne states:

> My limitations are:
>
> Walking: I am limited to walking no more than four blocks a day in total. Walking from my chair to the bathroom is part of the four-block limitation. I walk as little as possible. I basically sit in my chair and walk to my car and drive where I need to go and then

I sit down. I am aware of any physical activity that I do. There are times when I have over done it and paid the price. I once put six pieces of sod on my lawn after going to the store to buy and I then had to sit in my lounge chair for the next two days.
Dealing with the physical limitations emotionally has been hard as any physical pain that I have endured.

Sitting: Sitting is not a problem for me.

Standing: I can get light headed when I initially stand. After I stand for more than a couple of minutes I can feel my heart start beating faster, it is being physically taxed.

Lifting: I do not even attempt to lift anything. I might help my wife in the kitchen and I can lift a gallon of milk. I can not carry a gallon of milk to my car after purchasing it. I have to put the milk in a cart and then take it to my car. When I lift something that is beyond my limitations I become lightheaded and dizzy. I can lift things but I can not exert enough physical activity to carry something without seriously increasing the level of my heart rate.

Bending: I can not bend over to tie my shoes because the heart is so weak when I bend it restricts the flow of blood to my head. I can bend over for a short period of time but if I bend over for more than few seconds I get lightheaded and dizzy.

Twisting at the waist: It is not a problem for me.

Reaching: It is not a problem for me.

Stairs: I have less trouble going down stairs than going up the stairs. I can not climb one story of stairs. Once I have an increased heart beat and I then have difficulty breathing.

Balance: I do not have balance problems.

Activities around the inside or outside of the house: I do not anything inside or outside the house. I do not do anything that I physically can not do. I just can not do anything that increases my heart rate.

Driving: I can drive for about two and two and one half-hours before I have to get out to move around.

I have been asked to describe what I do on an average day. I get up about 7:30 and talk my medication. I have to wait I am at the country club almost everyday about 9:00 or 9:30 and stay there all day. I play cards there. I play Gin with four other guys. If it is a nice day I might play golf with a cart. I have a medical flag that allows me to drive across the fairways to get to my ball. Normally, the club does not allow someone to drive across the fairways.

I was a good golfer and I do not hit the ball that often. I am able to drive the cart right up to where my ball is lying. I find that the short walk to the ball from the cart and hitting the ball does not exert that much physical activity that causes lightheadedness and dizziness. When I pick up my ball I do not stay in that position for a time long enough to get dizzy. When it gets real hot I can not play. The hot humid air makes it hard for me to breathe. I play golf seventy or eighty times a year.

> I do not go food shopping or anything like that. I just bought some clothes and that was the first thing I bough in about 5 or 6 years.
>
> I have been asked about my social, travel, hobbies, and recreational activities: Besides golf I travel for leisure a couple times a year. I will go on vacation and maybe visit my son who goes to college in Massachusetts.
>
> I have been asked to describe what I do on a good day. I wish I did have good days. All of the days appear to be the same.
>
> I have been asked what prevents me from returning to work. There is no way that I could do what I did before. My physical limitations prevent me from doing what I did before. My job required me to travel a lot and work long days. I just could not do that any more. As president of a division I had to answer to the chief financial officer. I have 450,000 frequent flier miles and that does not include the use of the company airplane.

(*A.R. HFD 198-99*). Clearly, the Hartford disregarded Mr. Osborne's description of his physical condition. Further, Mr. Osborne plainly explained that his golfing does not require much physical activity—he merely walks from his cart (which he is allowed to drive on the course because of his illness) to the ball. Again, disregarding Mr. Osborne's statement is indicative of the Hartford's conflict of interest.

A letter from Dr. Newman of the U.T. Medical Group to Mr. John I. Houseal, Jr., plaintiff's attorney, dated February 13, 2002 provided to the Hartford during its Administrative

review that Mr. Osborne's medical condition had significantly worsened. Dr. Newman stated that Mr. Osborne had developed significant diabetes mellitus, which was exacerbated by Mr. Osborne's medication. Secondly, Dr. Newman noted that Mr. Osborne developed cardiac arrhythmia. Dr. Newman stated, "He developed one short 10-beat run of ventricular tachycardia. This is a particularly "serious heart rhythm and is indicative of the severity of his heart disease." Thirdly, Mr. Osborne has developed a leg pain upon ambulating known as claudicating. Dr. Newman stated that this would require vascular surgery intervention. At the end of this letter, Dr. Newman stated "I remain convinced that he (Mr. Osborne) is unable to engage in any sort of employment." (*A.R. HFD 3*).

As discussed above, it was arbitrary and capricious to classify Mr. Osborne's job as sedentary. The Hartford states:

> Our review of Mr. Osborne's medical information received to date has determined he has the ability to perform a fulltime sedentary occupation. Although Mr. Osborne does have some restrictions and limitations due to his diagnosis and medical condition, the medical records reflect his condition is not severe enough to preclude fulltime sedentary work. Dr. Newman assigned restrictions and limitations on 07/19/00 would also fall within fulltime sedentary work capacity.

(*A.R. HFD 74*). However, as noted above, Mr. Osborne's job is not fulltime sedentary work. It requires standing and walking 34% to 64% of the time. (*A.R. HFD 568*). The fact that the Hartford determined Mr. Osborne's own occupation was fulltime sedentary work is unreasonable.

Like the insurer's physician in *Cunningham,* who did not consider the plaintiff's actual job duties but based his opinion on plaintiff's clinical stability and his documented activity level, Dr. Joseph Vida, the Hartford's cardiologist, failed to consider Mr. Osborne's actual job duties, and based his opinion on a review of the medical records, a single phone conversation with the claimant's attending physician, Dr. Newman, and the surveillance tape. Most importantly, in his opinion letter of August 31, 2001, Dr. Vida states that he specifically was asked to comment on *"whether the [Mr. Osborne] [was] able to work in a sedentary capacity."* (*A.R. H.F.D. 84*) (*emphasis added*). The fact that Dr. Vida was asked whether Mr. Osborne was able to work in a sedentary capacity ultimately undermines his opinion, because it is clear that Mr. Osborne's occupation was not sedentary. Like in *Cunningham*, this court should reason that Dr. Vita's opinion as well as Hartford's reliance on Dr. Vita's opinion is arbitrary and capricious.

The report states, "There is little doubt that the functional capacity displayed in the surveillance video and report would permit the claimant to do *the sedentary work required to perform his previous job*, including traveling every other month."[11] (*A.R. HFD 84*). As shown above, Mr. Osborne's job was not sedentary. He was the president of an insurance agency, which requires him to sell insurance, undergo extensive traveling and is a stressful job. (*A.R. HFD 558. 574*). It also requires standing and walking 34% to 64% of the time. (*A.R. HFD 568*). Any conclusion to the contrary

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[11] It is reasonable to assume that Mr. Osborne curtailed his traveling because of his poor health. However, neither the Hartford nor Dr. Vita investigated this issue.

is arbitrary and capricious because it ignores Mr. Osborne's actual job duties.

Moreover, Dr. Vita's conclusion that Mr. Osborne has a left ventricular ejection fraction of 40 to 50% in recent years is not supported by the evidence. (*A.R. HFD 87*). Dr. Vida never directly examined Dr. Osborne. Further, Dr. Newman submitted to the Hartford a Operative Report dated January 20, 2004, which provides that Mr. Osborne's left ventricular ejection fraction is 14%.[12] (*Ex. "A" at 4*). The fact that no doctor for the Hartford directly examined Mr. Osborne is indicative of the Hartford's conflict of interest and weighs against the Hartford's case.

As in *Cunningham*, the surveillance conducted upon Mr. Osborne is scant evidence that Mr. Osborne is able to perform his occupation. (*A.R. HFD 41*). Whether Mr. Osborne can play golf or cards is not indicative of whether he can perform the material and substantial duties of his occupation, which includes standing and walking 3.5 to 6.5 hours a day as well as high stress and extensive traveling. All Hartford has done was "determine[] that [Mr. Osborne] can sit at a desk." *Cunningham*, 235 F.Supp.2d at 757.

The evidence does not support Hartford's denial of Mr. Osborne's claim. Mr. Osborne, his employer, and his treating physician of over 6 years determined that Mr. Osborne could not perform the material and substantial duties of his own occupation. The only evidence to the contrary was 1) the improper characterization of Mr. Osborne's occupation

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[12] Although this report was submitted to the Hartford, for some reason, it was not included in the administrative record or added as a supplement to the administrative record.

as sedentary, 2) Dr. Vita's determination that Mr. Osborne could perform sedentary work, and 3) the surveillance, which is irrelevant and indicative of the Hartford's conflict of interest. Like the insurer in *Cunningham,* the Hartford arbitrarily and capriciously denied his claim based upon the evidence.

CONCLUSION[13]

The Hartford's denial of Mr. Osborne's benefits was arbitrary and capricious because the Hartford arbitrarily classified his occupation as sedentary, and the evidence clearly established that Mr. Osborne was totally disabled under the policy. As discussed below, it was unreasonable for the Hartford to utilize the DOT's definition for "President, Financial Institution" to describe Mr. Osborne's occupation because 1) the Policy specifically provides that the Hartford was to consider Mr. Osborne's "own occupation," 2) Mr. Osborne's employer provided the Hartford with Mr. Osborne's job description and the physical requirements of his job and, 3) Mr. Osborne is not a president of a financial institution. Further, the evidence does not support the Hartford's denial. Mr. Osborne, his employer, and his treating physician of over 6 years determined that Mr. Osborne could not perform the material and substantial duties of his own occupation. The only evidence to the contrary was 1) the unreasonable characterization of Mr. Osborne's occupation as sedentary, 2) Dr. Vita's determination that Mr.

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[13] The Hartford also asserts that Plaintiff's breach of contract action is preempted and that injunctive relief is unavailable because Mr. Osborne has standing under ERISA § 502(a)(1)(B). The Plaintiff does not challenge these positions. The Court's determination on whether the Hartford was arbitrary and capricious in denying Mr. Osborne's claim is dispositive of the case.

Osborne could perform *sedentary* work, and 3) documentation of his activity level in the file and on surveillance. Accordingly, this Honorable Court should deny the Hartford's motion for judgment on the record, and award the Plaintiff disability benefits under the Policy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, postage prepaid, this 1st day of October 2004 to Mr. David. Thornton, 6060 Poplar Avenue, Suite 440, Memphis, Tennessee 38119.

/s/_____

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(2)

No. 06-1350

IN THE

Supreme Court of the United States

BRUCE OSBORNE,

Petitioner,

v.

HARTFORD LIFE AND ACCIDENT INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Sixth Circuit properly concluded that a plan administrator with discretion to determine benefits eligibility and to construe the terms of an ERISA-governed plan did not act arbitrarily and capriciously in terminating Petitioner's disability benefits.

RULE 29.6 STATEMENT

The parent corporation for Respondent Harford Life and Accident Insurance Company ("Hartford") is The Hartford Financial Services Group, Inc., which is a publicly-held company and owns 10% or more of Harford's capital stock.

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RESPONDENT'S BRIEF IN OPPOSITION

In the decision below, the Sixth Circuit applied well-settled legal principles to a unique set of facts. Its decision raises no issues worthy of this Court's review, and Petitioner's claims to the contrary are mistaken. The petition should therefore be denied.

1. Petitioner was employed as the President of Insurex Benefits Administration and Insurex Agency, Inc. ("Insurex") and was covered under his employer's group ERISA plan (the "Policy"). (CAJA 181-82) The Policy was obtained by Insurex's parent company TPI Restaurants, Inc. from Hartford Life and Accident Insurance Company ("Hartford"), which is both the administrator and issuer of the Policy. (CAJA 581-627) The Policy provided coverage if Petitioner was rendered "Totally Disabled," which is defined as "prevented by Disability from doing all the material and substantial duties of your own occupation on a full time basis." (CAJA 537-38) In May of 1996, Petitioner resigned as President of Insurex and applied for disability benefits under the Policy after suffering a heart attack and being diagnosed with congestive heart failure. (CAJA 77, 559-66)

In August of 1996, Hartford began paying long-term disability benefits to Petitioner. (CAJA 539) Hartford concluded that Petitioner qualified for long-term disability because he met the Policy's definition of "Totally Disabled." (CAJA 537-38) Specifically, Hartford concluded that Petitioner was disabled from his position as "A President" because that position would "encompass a great deal of stress," which he could not handle in his condition at that time. (CAJA 550, 552) Hartford notified Petitioner that he would continue receiving benefits "as long as [he] meet[s] the policy definition of total disability as it pertains to [his] claim." (CAJA 537)

In 2001, following a preliminary and then more detailed periodic review, Hartford concluded that Petitioner was no longer "Totally Disabled" under the terms of the Policy and terminated his benefit payments. (CAJA 81-85) The investigation produced video of Petitioner "display[ing] a good range of motion with no apparent signs of discomfort or physical limitation." (CAJA 84, 156, 225, 628) Petitioner was also observed spending a considerable amount of time at Colonial Country Club playing golf and cards. (CAJA 84, 156, 225) Indeed, during an interview with a Hartford investigator, Petitioner said that on a regular basis he arrived at Colonial Country Club at 11:30 in the morning and spent "all day" there. (CAJA 83, 165) He also explained that he played golf and cards while at the country club. (CAJA 83, 165) He estimated that he played 70-80 rounds of golf per year and maintained a handicap of twelve. (CAJA 83, 165)

In notifying Petitioner of its decision to discontinue his benefits, Hartford explained that its decision was "based . . . on policy language and all the documents contained in [Petitioner's] file." (CAJA 81) It further explained that a vocational assessment classified Petitioner's occupation as "Sedentary," which Petitioner was considered able to perform. (CAJA 84) In clarifying the basis of this classification, Hartford explained that it had concluded under the United States Department of Labor's Dictionary of Occupational Titles ("DOT"), that Petitioner's position with Insurex was properly classified as "President, Financial Institution," and that this occupation, as well as the occupation "President, Any Industry," were classifiable as "Sedentary." (CAJA 84, 128) Hartford explained that it had concluded Petitioner could perform the functions of this classification. (CAJA 84, 128)

Petitioner administratively appealed Hartford's decision, in part contesting Hartford's use of "a generic description of a president's job" in the DOT. (CAJA 111, 115) As part of the appeal review process, Hartford engaged Dr. Joseph A. Vita,

an independent cardiology specialist from the University Disability Consortium, to review Petitioner's file and surveillance data, as well as speak with Petitioner's treating physician. (CAJA 92-98, 107-08) Dr. Vita concluded that Petitioner could perform the sedentary work Hartford had determined Petitioner's position entailed. (CAJA 93, 97-98)

After reviewing Dr. Vita's report and the administrative record, Hartford concluded that Petitioner was no longer "Totally Disabled" under the terms of the Policy and reaffirmed its decision to deny Petitioner further benefits. (CAJA 86-88, 89-91) Hartford explained that its decision was based

> on the occupational requirements as the occupation exists in the national economy. Our research reveals that the occupation of "President, Financial Institution" is a sedentary occupation and in fact the occupation of "President, Any Industry" is also classified as Sedentary. Our Policy states specifically that benefits will be paid if one is Totally Disabled from his own occupation. [Petitioner's] occupation is that of a President of a Financial Institution. (CAJA 88, 91)

Hartford went on to note that Dr. Vita found that Petitioner's medical condition "would not prevent him from performing the duties of his own job as they were being performed when he left his position at Insurex." (CAJA 88, 91)

2. Petitioner filed suit in state court challenging Hartford's decision, and Hartford removed the case to the United States District Court for the Western District of Tennessee. Petitioner argued, among other things, that Hartford's interpretation of the term "own occupation" was erroneous. The District Court concluded, however, that the deferential standard of review applicable to Hartford's determination obviated the need for the court to construe that term. Pet. App. 37a. Rather, the District Court held that "the more prudent approach is not to usurp the discretion given to the

plan administrator to interpret the policy." *Id.* On the record as a whole, the District Court concluded that Hartford's determination was reasonable.

On appeal, the Sixth Circuit explained that its review was limited to whether Hartford's actions were arbitrary and capricious. Pet. App. 8a (citing *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 115 (1989)). It noted that the Policy vested full discretion in Hartford to determine eligibility, that it did not dictate how Hartford was to make such determinations, and that the term "occupation" was "sufficiently general and flexible to justify" Hartford's reliance on the DOT to determine Petitioner's occupation. *Id.* at 8a-9a. "Although reasonable persons may disagree over the most appropriate methodology for determining a particular employee's 'occupation,'" the court below concluded, "we cannot say that Hartford transgressed the boundaries of its broad discretion under its insurance policy and the ERISA plan to make disability determinations." *Id.* at 9a. The Sixth Circuit further explained that, in light of the arbitrary and capricious standard of review, "[t]he dispute before [it] is not over the meaning of 'own occupation,' which defines the term 'Total Disability,' but over the methodology Hartford used to determine [Petitioner's] occupation." *Id.* at 10a. That methodology, the Sixth Circuit determined, was "'reasonable.'" *Id.* at 9a.

The Sixth Circuit declined to address Petitioner's argument that he is not the president of a financial institution and that the DOT has a more accurate description Hartford should have used. Pet. App. 11a-12a. The court explained that Petitioner failed to raise the issue before the District Court and only raised it before the Sixth Circuit in his reply brief. The court declined to address this waived argument, noting that Petitioner's "new argument . . . is primarily factual." *Id.* at 12a.

REASONS FOR DENYING THE WRIT

Petitioner seeks review claiming that the decision below conflicts with decisions of other courts on the meaning of "own occupation" or "regular occupation." Alternatively, he claims that the Sixth Circuit's decision departs from other circuits on the issue whether Hartford used a properly comparable definition of his occupation. Both of these claims rest on a fundamental misunderstanding of the nature of arbitrary and capricious review. In addition, Petitioner waived his second ground for review.

1. The legal standards governing judicial review of eligibility determinations are well-settled, and Petitioner does not contend that the Sixth Circuit applied the wrong standard. In *Firestone*, this Court ruled that, where a plan gives the administrator discretion to construe uncertain terms or to determine eligibility for benefits, an administrator's denial of benefits under an ERISA-governed plan is reviewed under an arbitrary and capricious standard. 489 U.S. 101, 115 (1989). On the other hand, trust principles dictate that a court engage in *de novo* review when the administrator is not invested with such discretion. Hartford indisputably had discretion to determine benefit eligibility and to construe the terms of the Policy. Pet. App. 8a; *id.* at 28a (noting Petitioner's concession that the Policy gave Hartford discretion and that the applicable standard was whether Hartford acted arbitrarily and capriciously). Applying the proper arbitrary and capricious standard of review, the Sixth Circuit concluded that it could not "say that Hartford transgressed the boundaries of its broad discretion under its insurance policy and the ERISA plan to make disability determinations." *Id.* at 9a (citing *Gallagher* v. *Reliance Std. Life Ins. Co.*, 305 F.3d 264, 272 (4th Cir. 2002)).

Petitioner's claim that this straightforward ruling creates a conflict over the definition of "occupation" in ERISA plans, Pet. 16-17, fails to recognize the role that the relevant standard of review plays in determining the propriety of

benefit eligibility decisions. Petitioner claims that "uniform construction of terms such as 'regular occupation' and 'own occupation' in ERISA plans is a fundamental component of" ERISA's regulatory regime and that uniformity of interpretation is mandated by "the trust-based fiduciary model this Court has recognized" under ERISA. *Id.* at 16. But as the Sixth Circuit correctly recognized, the very nature of an arbitrary and capricious standard of review is that it allows for *multiple* answers to questions concerning the methodology an administrator may use or the definition it may reach under a plan that confers discretion. *See* Pet. App. 9a (recognizing that "reasonable persons may disagree over the most appropriate methodology for determining a particular employee's 'occupation'"). Under this standard of review, a court does not decide whether the particular choice was the one it would have made; rather, it must only decide whether the choice was permissible.

This Court has repeatedly recognized this fact when applying the essentially identical arbitrary and capricious standard used to review agency interpretations of statutes. *See Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (explaining that the court should not define an ambiguous term, but merely determine whether the agency reached a "permissible construction"). This deferential standard of review even allows for inconsistent interpretations of the same term. *See, e.g.*, *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) (noting that contradictory interpretations by an agency does not necessarily render a decision arbitrary and capricious); *see also Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). Under ERISA, therefore, administrators exercising discretion can adopt different interpretations of comparable terms in different plans, and reviewing courts must uphold these differing interpretations as long as they are not arbitrary or capricious. Thus, the trust-based model this Court has adopted—and the highly

deferential standard of review that model can entail—*precludes* the type of uniform construction of ERISA-governed plan terms that Petitioner seeks. *See also Black & Decker Disability Plan* v. *Nord*, 538 U.S. 822, 833 (2003) ("It is the Secretary of Labor's view that ERISA is best served by 'preserv[ing] the greatest flexibility possible for . . . operating claims processing systems consistent with the prudent administration of a plan." (alternation and omission in original)). Similarly, the existence of circuit decisions upholding different or even inconsistent interpretations of comparable terms in different plans is not evidence of a conflict. Rather, it follows naturally from adherence to the arbitrary and capricious standard of review this Court has mandated.

Petitioner's attempt to manufacture a circuit split out of "non-uniform" results, therefore, is entirely misplaced. Two of the cases he cites—*Gallagher* v. *Reliance Standard Life Insurance Co.*, 305 F.3d 264 (4th Cir. 2002), and *Kinstler* v. *First Reliance Standard Life Insurance Co.*, 181 F.3d 243 (2d Cir. 1999)—did not involve arbitrary and capricious review at all. Rather, in those cases, the courts concluded that the applicable plans did not vest discretionary authority in the administrator, and the courts therefore construed the terms *de novo*. *Gallagher*, 305 F.3d at 269-70; *Kinstler*, 181 F.3d at 252. Even assuming, as Petitioner claims, that the interpretation of "own occupation" that the Sixth Circuit upheld in this case differs from the interpretations that the *Gallagher* and *Kinstler* courts gave to comparable terms in other plans, this difference does not constitute a conflict among the circuits. It simply reflects the fact that the latter courts were employing a different standard of review than the Sixth Circuit used here.

Only two of the cases Petitioner cites actually used the arbitrary and capricious standard. In *Tsoulas* v. *Liberty Life Assurance Co. of Boston*, 454 F.3d 69 (1st Cir. 2006), the First Circuit concluded that the administrator's sole use of the DOT in assessing the claimant's duties did not render its

decision to deny benefits arbitrary and capricious. *Id.* at 78. That result is entirely consistent with the decision below. Indeed, like the Sixth Circuit here, the court looked to the Fourth Circuit's conclusion that the DOT is an appropriate reference when its description "'involve[s] comparable duties but not necessarily every duty.'" *Id.* (quoting *Gallagher*, 305 F.3d at 272); *see also* Pet. App. 9a (quoting same).

In *Lasser* v. *Reliance Standard Life Insurance Co.*, 344 F.3d 381 (3d Cir. 2003), the Third Circuit applied the arbitrary and capricious standard of review, but declined to defer to the administrator's interpretation of "regular occupation" because, the Third Circuit believed, the phrase was not ambiguous and, even if it were, the administrator's interpretation was unreasonable. *Id.* at 385-86. Brushing aside the different language of the two policies, Petitioner argues there is a conflict between *Lasser* and the decision in this case. But any such "conflict" is a conflict in *result* only, not in underlying legal principles. Accordingly, it raises no issues of national importance warranting this Court's review.

As noted above, ERISA does not mandate national uniformity in the construction of terms in benefit plans, and the standards of review *Firestone* establishes foreclose such uniformity. The decision below, therefore, affords the Court no opportunity to address a recurring and important question of federal law. Instead, the Court could decide only that, applying existing standards of review to the language of this plan, the Sixth Circuit either properly or improperly deferred to the administrator's eligibility decision. Because this Court does not sit to correct errors in the routine application of settled law, the "conflict in result" that Petitioner claims does not warrant review by this Court.

2. Alternatively, Petitioner contends that the Sixth Circuit should have reversed the administrator's decision in this case because a different definition in the DOT provides the more accurate description of his occupation. Pet. 17. This fact-bound claim likewise provides no basis for review. Indeed,

the Sixth Circuit itself noted that Petitioner's claim that Hartford should have used a more comparable definition from the DOT is simply a factual dispute.[1]

In all events, the issue is not properly presented. The Sixth Circuit explicitly declined to consider the issue because Petitioner failed to raise it until his reply brief on appeal, and had failed entirely to raise it before the District Court, which, understandably, did not address it. Pet. App. 11a-12a. Accordingly, the issue is not properly presented to this Court. *See California* v. *Taylor*, 353 U.S. 553, 557 n.2 (1957) (refusing to recognize a contention that was waived below by petitioner's failure to brief the issue). The issue was waived below and does not present the exceptional circumstance necessary to make an exception to the Court's general rule against considering unaddressed, waived arguments. *See Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam) (explaining the general rule that the Court will not address issues not passed on by the lower courts, refusing to address the merits of the unraised issue, but remanding the case on a constitutional issue to be addressed by the lower courts); *see also City of Springfield, Mass.* v. *Kibbe*, 480 U.S. 257, 259 (1987) (per curiam) (stating that the Court does not ordinarily decide questions not raised or litigated in the lower courts).

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[1] Petitioner's hyperbolic claim that the Sixth Circuit "allows an ERISA fiduciary to apply a completely arbitrary occupational description," Pet. 17, is manifestly wrong. By definition, the arbitrary and capricious standard of review the Sixth Circuit properly applied in this case would mandate reversal of a fiduciary's "completely arbitrary" choice of occupational definition.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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